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PUGALUMPERUMAL PILLAI *v.* THANGATHAMMAL, (1949) 1 M.L.J. 389.

This decision deals with a question of construction of a deed of gift executed by a Hindu, a commonplace question but nevertheless one frequently arising. The nature of the interest taken by a donee under a deed of gift is a mixed question of law and fact. It turns on the intention of the donor to be ascertained from the language of the gift deed. Where the document is in English a question of some nicety arises whether the words of the disposition, if they happen to carry a distinctive or technical sense in English law, should be so understood in this country as well. In the case of wills, it is well settled that in construing therein caution has to be exercised in regard to the importation of analogies afforded by the English law of Property or of the rules of construction that operate there. Apropos of this, it was observed by Lord Kingsdown in *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Achary Chowdhury*[1] : " It would be to apply a very false and mischievous principle, if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character founded in a great degree on feudal rules regulated by Acts of Parliament and adjusted by a long course of judicial determination to the wants of a state of society differing as far as possible from that which prevails among Hindus in India." The caution would equally be applicable to the construction of deeds of gift, particularly so in India where the distinction maintained till relatively recently between interpretation of wills and interpretation of deeds in England was not at any time recognised, and much more so where the deed is not in English but in the vernacular. Questions arising under Hindu law—the construction of any particular expression in a deed of gift by a Hindu in his own vernacular would *prima facie* be one such —have therefore to be determined by the doctrines of that law only. It was observed in *the Ramnad case*[2] : " The Hindu law contains within itself the principles of its own exposition and questions arising under it cannot be determined either on abstract reasoning or on analogies borrowed from other systems of law but must depend for their decision on the rules and doctrines propounded by their recognised law-givers and expounders." In the instant case, property had been conveyed to the donee as " stridhanam gift " . . . . " to hold and enjoy the . . . . property hereditarily and from son to grandson and so on as long as the sun and moon last." Though the Smritis have not given any exact definition of the term " stridhana " but have furnished only an enumeration of what is considered stridhana, Vijnaneswara has, in a way entirely his own, given a definition—स्त्रिया धनं स्त्रीधनम् ।. He has further stated that the etymological meaning of this term being obvious a technical meaning is inadmissible—योगसम्भवे परिभाषाया अयुक्तत्वात् । Therefore, according to Vijnaneswara, property taken by a woman in any mode whatsoever would be her absolute property. Whatever limitations may have been imposed in regard to the character of property coming to a woman by inheritance or partition by judicial decisions, so far as property received under a gift is concerned there is no objection to its being regarded as her absolute property unless there is an indication in the gift deed itself to the contrary. It is true that

1. (1865) 10 Moo.I.A. 279 (P.C.).
2. *Collector of Madura* v. *Mootoo Ramalinga*, (1867) 12 Moo.I.A. 397 (P.C.).

in *Mohamed Shamsool* v. *Shewakram*[1], the Judicial Committee had stated : " In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with reference to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate shall be retained in his family and it may be assumed that as a general rule, at all events, women do not take absolute estates of inheritance which they are unable to alienate." Whether the latter assumption is justifiable in view of modern trends, particularly as reflected in Articles 14 and 15 of the Indian Constitution or section 8 of the Transfer of Property Act, is a matter for consideration. In the present case, however, the use of the term " stridhanam " connoting literally woman's absolute property coupled with the direction that the property had been given to the donee hereditarily would make it clear that the intention of the donor was to confer an absolute estate. The other question that fell to be considered by the learned Judges was whether an absolute estate *prima facie* conveyed should be deemed to be cut down to a life estate by reason of a provision for reverter to the grantor in default of issue to the donee. In *Lalit Mohun Singh Roy* .v *Chukkun Lal Roy*[2], while following the principles enunciated by Lord Denman in *Doe. D. Gallini* v. *Gallini*[3], Lord Davey had laid down : " There are two cardinal principles in the construction of wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense ". In the case under notice, the learned Judges held applying the principles mentioned *supra* that the intention of the donor was to give an absolute estate to the donee, her daughter. The conclusion is perfectly consistent with the significance attributed to the user of the term stridhanam both by popular opinion as well as by Vijnaneswara.

SITHARAMAMURTHI CHETTY *v.* GURUSWAMI CHETTY, (1949) 1 M.L.J. 400.

Interesting questions in the law of partnership fell to be considered in this case. Section 4 of the Indian Partnership Act defines ' partnership' as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Section 9 charges the partners to carry on the business to the greatest common advantage and to be just and faithful to each other. Section 16 provides *inter alia* that if a partner derived any profit for himself from the use of the partnership property or business connection of the firm or the firm name he shall account for that profit and pay it to the firm. It is of interest to note that section 88 of the Trusts Act enacts the rule that where a partner or other person bound in a fiduciary character to protect the interests of another person by availing himself of his character, gains for himself a pecuniary advantage he must hold for the benefit of such other person the advantage so gained. Illustrations (*d*), (*e*) and (*f*) to the section are indicative of some of the circumstances under which, though the advantage has been gained by a partner for himself, he will have to hold it for the benefit of all the partners. A similar rule is enacted by section 90 with reference to any acquisition made by a tenant for life, co-owner, mortgagee or any other qualified owner of property. The principle underlying these provisions would apply equally whether the user is actual or constructive, whether the acquirer acquires the benefit for himself either deliberately or otherwise, whether the user is of the property or of the position *qua* partner or of the name of the partnership. This last is to be objective altogether. If the test is satisfied then the acquired property would automatically enure for the benefit of the partnership. The presumption created seems irrebuttable. The liability is the result of the interaction of two distinctive factors, namely, the *fiduciary character* of the relationship between the parties and the *user* actual or constructive, in the acquisition of the advantage, of the position afforded by such fiduciary relationship. The liability is an obliga-

1. (1874) L.R. 2 I.A. 7 (P.C.).
2. (1897) L.R. 24 I.A. 76 : I.L.R. 24 Cal. 834 (P.C.).
3. (1833) 5 B. & Ad. 621 : 110 E.R. 920.

tion in the nature of a trust and under section 95 the obligor is in such cases subject, so far as may be, to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it. In the case of a trustee proper, if he gains an advantage for himself attributable to his position or inconsistently with the standard of integrity attaching to his status there is no doubt that an irrebuttable presumption will arise that the advantage must be held for the benefit of the *cestui qui trust*. The question is whether the same considerations would operate in regard to a renewal of a lease of partnership property obtained by one of the partners without the privity of the others for his own personal advantage. The case under review holds that the same considerations do not operate and that the law of India as to these matters is substantially the same as the law in England. It is submitted that a different result appears to be indicated by the provisions of law in this country. So far as the English law is concerned, in *Keech* v. *Sandford*[1], it was ruled by Lord King that a trustee of leasehold property getting a renewal of the lease in his favour would be a constructive trustee for the beneficiary in respect of the advantage so gained. A Court of equity always fastens a constructive trust wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee. The same incapacity is held to attach to personal representatives like executors. The principle is also held to be applicable to cases of persons who are not primarily trustees at all, as for instance, tenants for life in relation to remaindermen, mortgagees, etc. The basis for holding the renewal of the lease as operating for the benefit of the persons towards whom the acquirer, is in a special position is that the renewal is really "an *accretion* to or *graft* upon the original term", In re *Biss* v. *Biss*[2], *Bevan* v. *Webb*[3], *Griffith* v. *Owen*[4], that it "comes *from the same root*", *Rakestraw* v. *Brewer*[5], that the *locus standi* and opportunity for acquiring the advantage were afforded by the position of the acquirer, *Cassels* v. *Stewart*[6], and that the old lease was the *foundation* of the new lease, *Clegg* v. *Fishwick*[7]. In the last mentioned case the Lord Chancellor observed : "The old lease was the foundation of the new lease, the tenant right of renewal arising out of the old lease giving the partners the benefit of the new lease ; *at least the law assumes it to be so*" (italics ours). It is immaterial if the right of renewal was attributable to a custom or agreement or any other cause or was obtained by surrender of the lease or before the expiry of the old lease, *per* Romer, J., in In re *Biss* v. *Biss*[8]. The manner in which the presumption came to attach even to cases where the original lease itself gave no right to renewal is somewhat interesting to follow. In the case of large landowners and ecclesiastical bodies, though the owners of such a lease had no legal claim for a renewal, yet, they had hope or expectation of it derived from and based upon their ownership of the original lease and even this hope or expectation was described as a tenant right[9] and therefore as associated with or arising out of or referable to the original lease or term. The purchase of a reversion was, however, regarded as standing on a different footing and would not necessarily attract the presumption that the purchase was an accretion to the original term, see *Bevan* v. *Webb*[3]. If the trustee of a lease not renewable by contract or custom buys the reversion on the lease he may in the absence of fraud hold it for his own benefit. In regard to the operation of the presumption, English law maintains a distinction between the case of trustees and personal representatives on the one hand and others. As to the former, the presumption is one of law and irrebuttable. As to the latter, it is one of fact and rebuttable. As to the former, the liability is absolute ; as to the latter not so. The reason is that in the former case the presumption rests on public policy, *Griffin*, *Griffin*[10], *Blewett* v. *Millet*[11], per Collins M. R. in In re *Biss* v. *Biss*[2]. Apropos of this it was observed by Parker, J., in *Griffith* v. *Owen*[4] : "The principle of *Keech* v. *Sandford*[1] is primarily applicable to renewal

1. (1726) Sel. Cas., Ch. 61 : 25 E.R. 223.
2. (1903) 2 Ch. 40.
3. (1905) 1 Ch. 620.
4. (1907) 1 Ch. 195.
5. (1728) 2 P.W. 511 : 24 E.R. 839.
6. (1881) 6 A.C. 64.
7. (1849) 1 Mac. & G. 293 : 41 E.R. 278.
8. (1903) 2 Ch. 40, 60.
9. Ashburner's Principles of Equity, 2nd ed., p. 309.
10. 1 Sch. & Lef. 352, 354.
11. (1774) 7 Moo.P.C. 367.

of a lease and depends partly on the nature of leasehold property and partly on some fiduciary relationship or duty existing on the part of the person whom it is sought to declare a trustee towards the persons who seek to have the trust declared. In the case both of leases renewable by right or custom and of leases not so renewable, the renewal is *prima facie* considered to have been obtained by virtue of the interest which the person obtaining the renewal has in the property, and accordingly the renewed lease is *prima facie* looked upon as a graft on the original interest and subject to the same trusts or limitations. In some cases the person who obtains the renewal is allowed, in others he is not allowed, to show that in spite of the nature of the property, there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit. Whether he is or is not allowed to do this depends on the particular fiduciary relationship or duty existing on his part. Thus a trustee is never allowed to do this ; but a mortgagee is." The case of a partner in English law is regarded as falling within the category of persons against whom the presumption is not irrebuttable. The position has been thus stated[1] : If a partner " renew the term upon his own account, he shall hold for the benefit of all parties interested in the old lease ; for in consideration of equity the subject of the settlement is not only the lease, but also the right of renewal ; and no person taking only a limited interest can avail himself of the situation in which the settlement has placed him to obtain a disproportionate advantage in derogation of the rights of others who have similar claims." The presumption is declared to be a rebuttable presumption of fact, see *Nesbitt* v. *Tredennick*[2]. The position of a partner was considered directly in *Featherstonehaugh* v. *Fenwick*[3]. There, two of the partners in a partnership concerned had obtained in their own names a renewal of the lease of the partnership premises, immediately dissolved the partnership and sought to exclude the plaintiff, their copartner from all interest in the new lease. It was held by Sir William Grant that one partner cannot treat privately and behind the backs of his copartners, for a lease of the premises where the joint trade was carried on, for his own individual benefit and that if he does so treat and obtains a lease in his own name, it is a trust for the parnership. The reason for the rule was explained as follows by Lord Selborne L. C. in *Cassels* v. *Stewart*[4]: " A man obtaining his *locus standi* and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but if he acquires any benefit to communicate it to them." *Clegg* v. *Edmondson*[5] is an important pronouncement on this matter. There the partnership was one at will. The managing partners gave notice of dissolution and of their intention to renew the old lease for their own benefit. They afterwards did so obtain a renewal, the other partners protesting, and there was evidence to show that the landlord objected to renew the lease in favour of any persons other than the managing partners. It was pointed out by the Court that it was not competent to the managing partners to acquire for themselves the benefit of the renewed lease, though on the facts of the case the plaintiffs were denied any right to the benefit of the renewal inasmuch as they had with full knowledge of their rights allowed the managing partners to carry on at their own risk for a long time without taking any steps to assert their rights by legal proceedings. In the course of his judgment Turner, L.J., expressed the view that the presumption as to the benefit of the advantage gained by a partner is not irrebuttable. The decision also makes it clear that circumstances like the partnership being at will and liable to dissolution at any time or the lessor's unwillingness to renew the lease in favour of any person except the managing partners are wholly irrelevant. Turner, L.J., remarked : " I am not prepared to say that in no case can a partner during the continuance of the partnership contract for a new lease to be granted to himself of property which is in lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. The authorities,

1. Lewin on Trusts, 14th ed., p. 161.
2. 1 B. & B. 29.
3. (1810) 17 Ves. Jun. 297 : 34 E.R. 115.
4. (1881) 6 A.C. 64, 73.
5. (1857) 8 De G. M. & G. 785.

I think, do not warrant that position; but this, I think, is plain upon all the authorities, that it is very difficult for any partner to secure to himself to the exclusion of his copartners the benefit of a lease so contracted for". Where it is not a case of renewal of the old lease but the purchase of the reversion on a lease the partner purchasing cannot be said to do so by virtue of any interest in the lease where the lease was not renewable by custom or contract. In *Bevan* v. *Webb*[1], Warrington, J., observed as to these matters: "If a trustee or a person in the position of a trustee, holding as part of his trust property a lease, takes a renewal of that lease, that renewed lease is treated as a graft or addition to the trust property and itself forms part of the trust property . . . . . . And I think also there is no doubt the principle is applicable to the relations between partners, and if part of the assets of the firm consists of leasehold premises, one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit". The learned Judge also pointed out that the doctrine that wherever the reversion on a lease which forms part of a trust estate is purchased by the trustee of the lease the purchase is for the benefit of the trust estate applies only to leaseholds which are renewable by custom or contract and so if a trustee of a lease which is not thus renewable buys the reversion on the lease he may in the absence of fraud hold it for his own benefit. It would thus seem that it is not merely the incapacity induced by the fiduciary position but also the possibility of attributing the advantage gained to that position that creates the presumption and colours its character. Adverting to the decision in In re *Biss* v. *Biss*[2], it was observed by Varadachariar, J., in *Ramalinga Reddy* v. *Ramalinga Setty*[3]: "The implication of this judgment clearly is that except in the case of trustees, thare is no irrebuttable presumption in support of the equity (see also *Babani Sairoo* v. *Bulba Govind*)[4]. It only remains to refer to *Trimble* v. *Goldberg*[5] as establishing that the equity arising from the fiduciary obligation or duty subsisting between partners cannot be extended to cover every transaction entered into by one of them merely on the ground that there is some connection between the partnership and the transaction complained of; it must be shown that the transaction was within the scope of the partnership or part of the business of the partnership or an undertaking in rivalry with the partnership or indeed connected with it in any proper sense". The learned Judge also holds that the statute law of India has not substantially deviated from the rules of English law. The last conclusion is however debatable. Granted that before the advantage gained by a partner ostensibly for his own personal benefit could operate for the benefit of the partnership it must be shown that the transaction in question was connected with the partnership "in any proper sense", it is difficult to see why when such connection has been established the presumption arising as to the character of the acquisition should not be as irrebuttable as in the case of a trustee *stricto sensu* in whose case also the presumption operates only on proof that the acquisition can be correlated with the position of the acquirer as trustee. The language of the illustrations (*d*), (*e*) and (*f*) to section 88 of the Trusts Act as compared with that of the illustration attached to section 258 of the Contract Act is significant. The former illustrations state in every case that the advantage gained *shall* enure for the benefit of the partnership. The illustration in the Contract Act however left it to the *option* of the concerned partners to assert a claim. They "are entitled to participate *if they please*." This would suggest that the advantage gained does not automatically attach to the partnership. The illustration has now been dropped and is not reproduced in section 16 of the Partnership Act which embodies the principle of section 258, Contract Act. Could it not therefore be argued that this omission is deliberate and the intention is to leave the character of the presumption in the form in which it is found in the illustrations to section 88 of the Trusts Act referred to *supra*, namely, that the advantage gained by the partner shall enure for the benefit of the partnership as surely as it will if it were a case of trust?

1. (1905) 1 Ch. 620, 625.
2. (1903) 2 Ch. 40.
3. (1939) 2 M.L.J. 790.
4. (1932) 137 I.C. 355: A.I.R. 1932 Bom. 240.
5. (1906) A.C. 494.

NAGIREDDI PATHURAJU *v.* VEERA VENKATA SATYANARAYANA, (1949) 1 M.L.J. 420. This case is concerned with another interesting point in the law of partnership. It holds that though in a suit for the dissolution of a partnership the Court has power to sell even a going concern, yet, when one of the partners has a dominant or greatly preponderating interest in the concern, his interest should be considered and any proposal submitted by him for the purchase by himself of the shares of the other partners is entitled to consideration. The suit for dissolution cannot serve as a cover or cloak for either party to spite the other. It would seem reasonable that the party who has the major interest should have an opportunity of keeping the concern where to allow him to acquire it will not in any way prejudice the interests of the other parties or will not in any way be unjust. It is true that ordinarily in the absence of any agreement to the contrary the right of each partner on a dissolution is to have the partnership property converted into money by a sale.[1] The rule however is not absolute. In *Syers* v. *Syers*[2], the plaintiff had lent moneys to the defendant and stipulated that a deed of partnership should be executed giving the plaintiff one-eighth share of the profits of the business, the property being a music hall which was a going concern. A dispute having risen between the parties, Lord Cairns, L.C., observed : "My Lords, it is very true as was said at the Bar, that on dissolving a partnership of this kind the ordinary course be for the Court to direct a sale of the assets and, if necessary, a sale of the concern as a going concern and to give liberty for proposals to be made by either party to purchase it before the Judge in Chambers. My Lords, these provisions are moulded in every case by the Court to meet the circumstances of the particular case ; and it appears to me that looking at the nature of this business and looking at the very small interest which was taken in it by the respondent, it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore in which, if a decree for dissolution had been made in the first instance, I apprehend, that the Court would have thought it right to authorise the owner of seven-eighths of the concern to lay proposals for a purchase before the Judge in Chambers". These observations lend support to the view that where one partner has a preponderating interest in the business it will not be fair to have a public sale of the business merely to ascertain its money value on dissolution. The major partner should have an opportunity, if he so desires, to acquire the interests of the others. In the case under notice the plaintiff's share was one-fifth and the defendant's four-fifth ; the property concerned was a rice-mill and its value according to the plaintiff would be Rs. 30,000 and according to the defendant Rs. 15,000. The evidence showed that the defendant was "genuinely anxious" to retain the mill for himself and purchase the plaintiff's share. It also showed that to achieve that object the defendant was agreeable to accept the plaintiff's valuation. In the circumstances the direction to sell by public auction the plaintiff's share alone of the mill with the plaintiff's valuation as the starting bid will, with respect, be an equitable solution giving the defendant the opportunity of acquiring the plaintiff's interest and getting the whole property for himself and at the same time ensuring to the plaintiff the advantages which a higher bid for his share would fetch.

SUBBA REDDI *v.* KOTI REDDI, (1949) 1 M.L.J. 425.

This is a decision of more than passing interest regarding the scope of Order 41, rule 33, of the Civil Procedure Code which provides that the appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. The instant decision makes two points : (i) that relief under the above provision

1. Lindley on Partnership, 10th ed, p. 642. 2. (1876) A.C. 174.

can only be granted in a pending appeal and not in an appeal already disposed of; and (ii) that the concluding words of the provision suggest that the discretion of the Court is not invokable where the party seeking relief had in fact preferred an appeal which had been however thrown out. The matter seems to be one of first impression. The considerations set out *infra* should indicate a different result on both the points. The basis for the rule embodied in Order 41, rule 33, is to be found in Order 58, rule 4 of the Rules of the Supreme Court in England. The provision was introduced into the Civil Procedure Code for the first time in 1908. The Court's discretion is to be exercised *ex debito justitiae*. The range and sweep of the discretion has been the subject of consideration in a number of decisions. So far as Madras is concerned, it is unnecessary to look beyond the Full Bench ruling in *Subramania Chettiar* v. *Sinnammal*[1]. There Madhavan Nair, J., observed: "Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent ends of justice from being defeated. By the very terms of the order, involving as it does an exercise of judicial discretion, the question whether the appellate Court should exercise the powers conferred by them in any particular case would no doubt depend upon the special facts and circumstances of that case. The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by rule 33; but it does not by any means exhaust the class of cases in which the powers of the appellate Court under this rule may be invoked. Having regard to the wide language of the rule it is inexpedient to lay down any hard and fast rule regarding the true scope of this provision. In a *proper case* the Courts should not hesitate to use the powers conferred upon it by this rule". Two things are made clear: (i) The object of the rule being to prevent the ends of justice from being defeated, it is inexpedient to lay down any hard and fast rule regarding the scope of the discretion; (ii) the Court should not hesitate to use the powers conferred upon it by the rule in a proper case. In *Thirumalachariar* v. *Athimoola Karayalar*[2], it was stated with reference to the Full Bench ruling: "That ruling has established that in a proper case the appellate Court has ample discretion to make any decree or order to prevent the ends of justice from being defeated . . . . . Rule 33 imposes no conditions". In that case, the plaintiff had filed a suit to enforce an agreement for sale as against defendants 1 to 7. The suit was decreed *ex parte* as against all the defendants. Defendants 2 to 6 applied to have the *ex parte* order set aside. Defendants 1 and 7 who were women did not so apply. The Subordinate Judge set aside the decree against all the defendants. The plaintiff preferred a Civil Revision Petition to the High Court against that order. While dismissing the petition against defendants 2 to 6, the High Court restored the decree against defendants 1 and 7. The Subordinate Judge who re-tried the suit found that the document on which the suit was based was not genuine and so dismissed the suit against defendants 2 to 6. The result was that the *ex parte* decree against defendants 1 and 7 stood but as regards the rest of the defendants the decree stood vacated. An appeal preferred by the plaintiff against the dismissal of his suit was rejected. The High Court's powers under Order 41, rule 33, having been invoked on behalf of defendants 1 and 7, the suit was dismissed against them also. The document on which the entire suit rested having been found not to be genuine it would have been illogical and unjust to hold that while the suit had been dismissed against defendants 2 to 6, the decree against defendants 1 and 7 should be allowed to stand. On that ground the High Court exercised its powers under Order 41, rule 33. A recent decision of the Federal Court, *Hari Sankar Pal* v. *Anath Nath Mitter*[3] is also instructive on this matter. It was there observed: "It cannot be disputed that in a proper case the appellate Court can, under the provision of Order 41, rule 33, Civil Procedure Code, vary or reverse a decree or order of the Court below even in favour of a party who has not preferred any appeal or cross-objection. These powers indeed should be cautiously used with due regard to the circumstances of each

1. (1930) I.L.R. 53 Mad. 881 : 59 M.L.J. 634 (F.B.)
2. (1932) 62 M.L.J. 15.
3. (1949) 2 M.L.J. 20 : 1949 F.L.J. 125 (F.C.).

individual case, but no rigid rule can be laid down fettering the discretion of the Court in such matters which the Legislature has, for best of reasons, left unfettered. In the case before us, although the appeal was by some of the proprietors and was in respect of that portion of the Tribunal's award which affected them, *the ground urged in support of the appeal was common to all the proprietors and it challenged the propriety of the entire decision* of the Improvement Tribunal. The High Court accepted the appellant's contention and reversed the decision of the Tribunal and in allowing the appeal, it was certainly within its powers to reverse the decree with regard to the non-appealing proprietors as well who figured as respondents in the appeal, if it considered such order or decree to be necessary for doing complete justice between the parties and to avoid inconsistent decisions in the same proceeding. We cannot say that the interference by the learned Judges has not been in this case in exercise of a sound judicial discretion. The question, however, still arises, as to whether the High Court could exercise these powers under Order 41, rule 33, Civil Procedure Code, *subsequent to the disposal of the appeal*, on an application for review of the judgment when in the judgment itself these powers were not exercised . . . . Order 41, rule 33, of the Civil Procedure Code is a purely enabling provision which enables the appellate Court to exercise certain powers in favour of a party who has not filed the appeal if the circumstances of the case and the interests of justice so require. The powers being discretionary no Court can be compelled to make an order under this rule; but if the appellate court while it allows the appeal refuses to make any order in favour of a non-appealing party, whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of Order 41, rule 33 of the Civil Procedure Code . . . . . we do not think that the Court is incompetent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an application for review" (italics ours). The italicised portions show that where the ground urged in appeal challenged the propriety of the entire decision and was a ground common to all the defendants, the discretion under Order 41, rule 33 could be exercised and secondly the mere fact that the power is invoked subsequent to the disposal of the appeal will be no ground for refusing to exercise the same. Where the refusal to give relief to the party who had not appealed or effectively appealed would tend to defeat the ends of justice relief under Order 41, rule 33 could be given. Nor would it be logical to deny relief to a party merely because of the dismissal of his own appeal for a technical reason. In the case under notice, there were two suits each one of which was by a different plaintiff against the same two defendants on an identical cause of action for recovery of damages for malicious prosecution. Both suits were decreed. Appeals were taken to the appellate Court by each of the two defendants in the two suits. The appeals of one of the defendants were dismissed for default and further appeals preferred to the High Court against the order of refusal to set aside the dismissals for default were also dismissed. Thus the decision of the trial Court giving a decree against that defendant had become final. In the meanwhile, the appeals preferred by the other defendant had been allowed a few days before the High Court had dismissed the appeals of the former defendant against the order of refusal to set aside the dismissals of his appeals. On the dismissal of the C. M. As. by the High Court, the defendant who had brought those appeals applied to be added as a party in the appeals preferred by his co-defendant and prayed for the same relief to be given to him as against the plaintiff. But by then those appeals had been disposed of. In those circumstances, the case under review had held that the powers under Order 41, rule 33 could not be exercised in favour of the applicant. The observations from the decisions of the Full Bench in *Subramanian Chettiar* v. *Sinnammal*[1] and of the Federal Court in *Hari Sankar Pal* v. *Anath Nath Mitter*[2] show that in coming to that conclusion on the scope of Order 41, rule 33 the learned Judge in the instant decision has taken a rather narrow view of the range of discretion conferred on an appellate Court by that provision of law.

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1. (1930) 59 M.L.J. 634 : I.L.R. 53 Mad. 881 (F.B.).
2. (1949) 2 M.L.J. 20 : 1949 F.L.J. 125 (F.C.).

KASI AMMAL v. RAMASWAMI REDDIAR, (1949) 1 M.L.J. 426.

This is yet another decision bearing on the rule of law embodied in section 112 of the Evidence Act. Certain observations in the judgment seem to be rather debatable. According to the section, the fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The term "access" had been interpreted by Venkatasubba Rao, J., as actual sexual intercourse—see *Jagannadha Mudali* v. *Chinnaswami Chetti*[1], *Samuel* v. *Annammal*[2]; but this view is no longer tenable as is clear from the decision of the Privy Council in *Karapaya Servai* v. *Mayandi*[3] There it was observed: "It was suggested by counsel for the appellants that 'access' in the section implied actual co-habitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn on the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse." It is thus clear that the only way in which the presumption arising under section 112 can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten, *Hanumantarao* v. *Ramachandrayya*[4], *Krishnappa* v. *Venkatappa*[5] The decision under notice seems to accept the rule so stated. It also interprets the finding of the lower Court on that matter to that effect. Thus at one place it is stated: "I interpret this finding to mean that the first defendant had never an opportunity of intercourse with the first plaintiff." Later on, again, it is observed: "In my view, the finding, therefore of the learned Subordinate Judge amounts to saying that the first defendant had no opportunity of intercourse with the first plaintiff at the material period." The learned Judge however proceeded to remark: "The one method of proving that a man had no opportunity of intercourse is to conclusively establish that he had no intercourse with the woman." Surely, this reasoning is not accurate. For one thing, to establish conclusively that a man had no intimacy with a woman though there was opportunity therefor is almost impossible, inasmuch as what is to be proved is a negative. Secondly, proof of non-intercourse will not *per se* be proof of lack of opportunity. The opportunity might have existed but might not have been availed of. This possibility is fully recognised in Islamic jurisprudence in the institution of "valid retirement" which contemplates the spouses being together in circumstances presenting no legal or physical impediment to actual sexual intimacy though in fact there might have been no such intimacy. The effect of valid retirement is for many purposes the same as if the marriage was consummated. It is so treated as regards the paternity of any child conceived by the woman during that time. All that section 112 of the Evidence Act requires is proof of absence of opportunity. Whether in any particular case there was such opportunity must necessarily depend on the circumstances of the case. The mere fact that the spouses happened to be in the same locality at the relevant period would *per se* be no proof of such opportunity. In the *Aylesford Peerage case*[6], Lord Selborne observed: "No doubt they were at the same time, during the critical period when this child might have been conceived, for certain spaces of time at different houses in London; but the lady was at a house where she was receiving the visits of her paramour; the husband was in constant intercourse with friends and constant communication with servants all of whom would have been certainly likely to know if he had been in the habit of visiting his wife. All of them as far as a negative can be proved, proved the contrary. So that you have all the evidence which the nature of the case admits of, and all the probabilities of the case, to negative the suggestion that (though it was possible they should meet) they actually did meet." A case falling on the other side of the line was that in *Karapaya Servai*

1. (1931) 61 M.L.J. 878 : I.L.R. 55 Mad. 243.
2. (1934) 66 M.L.J. 279.
3. (1933) I.L.R. 12 Rang. 243 : 63 M.L.J. 288 (P.C.).
4. (1944) 1 M.L.J. 285 : I.L.R. (1945) Mad. 53.
5. (1943) 2 M.L.J. 108.
6. (1886) 11 A.C. 1.

v. *Mayandi*[1], where Sir George Lowndes summed up the facts as follows: "The materiality of these facts, however, is that in December, 1931, the parties were admittedly in touch with each other, were residing at all events for a short period in reasonable proximity, the wife being in the house of a relative of the husband, and that there is nothing . . . . . . to suggest that she was unfaithful or that the parties were on terms of personal hostility."

SATYAM *v.* VENKATASWAMI, (1949) 1 M.L.J. 434.

An important practice point is covered by this case. It is the normal procedure that the testimony of every person should be rendered orally in open court in the presence and under the personal direction and superintendence of the Judge. Order 18, rule 4, Civil Procedure Code, so provides. Exceptions to this rule are cases of examination by interrogatories or on commission. Section 1 of the Evidence Act does not apply to affidavits presented to any Court or officer. But this would not mean that the affidavit of any person can go in as evidence without necessity for that person to get into the witness box. The circumstances relating to the use of affidavit evidence have been considered in *Warner* v. *Mosses*[2], where it is pointed out that in the absence of any agreement between the parties to take evidence by affidavit or order of Court permitting particular facts to be proved by affidavit or order of Court for examination by interrogatories or before a commissioner, witnesses shall be examined *viva voce* in open Court. According to English law the parties may agree to have a suit tried on affidavit[3]. The Civil Procedure Code has no express provision in regard to the matter but there is nothing precluding the parties from entering into such an agreement. In *Narayana* v. *Lakshmayya*[4], Burn, J., has held that affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. Reception of affidavit evidence by order of Court is controlled by the provisions of Order 19, rule 1, Civil Procedure Code following Order 37, rule 1 of the English Supreme Court Rules. Under the first part of Order 19, rule 1, the Court has power to order any particular fact or facts to be proved by affidavit even if the parties do not wish it. Under the second part, the Court has, subject to the proviso, the power to order the reading of the affidavit against the wish of one party. And an affidavit in such cases does not cease to be evidence of the facts alleged therein if the other party does not make any request for the attendance of the deponent for cross-examination and it is not incumbent on the deponent to go into the witness box voluntarily though no demand or request therefor is made by the other side, *Jamaluddin Abdul Wahab* v. *Abdul Ali*[5]. The decision under notice also indicates that even if there is waiver of an objection as to admissibility of affidavit evidence, the relevancy of such evidence would still be a matter for the consideration of Courts.

NATESAN *In re.*, (1949) 1 M.L.J. 438.

The duties of an auditor in our contry in regard to the scrutiny of the accounts of a company are defined in section 145 of the Companies Act. He has to make his report to the members of the company on the accounts examined by him, and, on every balance sheet he has to state *inter alia* whether he has or has not been able to obtain all the information and explanation he required, whether in his opinion the balance-sheet and the profit and loss acount referred to in his report are drawn up in conformity with law, and, whether the balance-sheet exhibits a true and correct view of the company's affairs according to the best of his information and the explanations given to him and as shown by the books of the company. It is clear that unless the auditor is to be held strictly to his legal liability, however honest he may be, the object of the Legislature in requiring a certificate from him would be absolutely defeated. Section 145 provides that if any auditor's report is made

1. (1933) I.L.R. 12 Rang 243 : 66 M.L.J. 288 (P.C.).
2. (1860) 16 Ch. 100, 101.
3. Order 37, rule 1 and Order 38, rules 25-30, Supreme Court Rules.
4. (1939) 2 M.L.J. 399.
5. (1949) 4 D.L.R. (All.) 277.

which does not comply with the requirements of the section, every auditor who is knowlingly and wilfully a party to the default shall be punishable with fine which may extend to Rs. 100. Section 282 lays down that whoever in any report, return, certificate, balance-sheet or other document required for purposes of the Act wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to 3 years and shall also be liable to fine. The mode in which the auditor should approach the discharge of his duties, the particulars to which he should invite the attention of the members of the company in his report and the form in which such attention is to be invited have often come up before the Courts for consideration. In what has always been regarded as the leading decision on this subject, In re *London & General Bank*[1], an auditor, one Mr. Theobald, had pressented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company had been invested and the difficulty of realising the same, but in his report to the shareholders he had merely stated that the value of the assets was dependent on realisation. The shareholders were deceived as to the condition of the company and declared a dividend out of capital and not out of income. It was held that the auditor was guilty of misfeasance under section 10 of the Companies (Winding up) Act, 1890, 53 & 54 Vic, c. 63. In the course of his judgment, Lindley, L.J., observed : " It is no part of an auditor's duty to give advice either to the directors or to the shareholers, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that . . . . How is he to ascertain that position ? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to acsertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming that the books are so kept as to show the true position of the company, the auditor has to frame a balance-sheet showing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. . . . An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer ; he does not guarantee that the books do correctly show the true position of the company's affairs ; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without want of any reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor : he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend on the circumstances of that case". It was further pointed out by the learned Lord Justice that it would be the auditor's duty to " check the cash, examine vouchers for payments, see that the bills and securities entered in the books were held by the bank and take reasonable care to ascertain their value ". Referring to this decision, the same learned Lord Justice stated in In re *Kingston Cotton Mill Co.*[2] : " It was there pointed out that an auditor's duty is to examine the books, ascertain that they are right, and to prepare a balance-sheet showing the true financial position of the company at the time to which the

1. (1895) 2 Ch. 673 (C.A.). 2. (1896) 2 Ch. 279 (C.A.).

balance-sheet refers. But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill. It was further pointed out that what in a particular case is a reasonable amount of care and skill depends on the circumstances of the case ; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused . . . . I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful ". In the same case Lopes, L.J., observed : " It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog but not a blood-hound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and to rely upon their representations provided he takes reasonable care. If there is anything calculated to excite suspicion he could probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful ". He added : " Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion and when these frauds are perpetrated by tried servants of the company and are undetected for years by the directors ; so to hold would make the position of an auditor intolerable ". Sargant, L.J., in agreeing pointed out that the duty of an auditor is verification and not detection. That an auditor's duty does not however end with merely ascertaining whether there are vouchers in respect of the disbursements made but he has also to see whether the payments are authorised by the duty of the authority concerned is brought out in *Thomas* v. *Davenport Corporation*[1]. There Lord Russell, C.J., stated : " I do not subscribe to the doctrine that his sole duty is to see whether there are vouchers apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of auditors. I think an auditor is not only entitled but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorised by the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority ". As to the manner in which the attention of the shareholders should be drawn, it was laid down by Lindley, L.J., in In re *London and General Bank*[2] that a person whose duty is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them to ask for more ; for information and means of information are by no means the same. An instructive pronouncement on the duties of auditors is to be found in the judgments of Romer, J., in the first instance and of Pollock, M. R. on appeal, in In re *City Equitable Fire Insurance Company*[3]. According to them an auditor will not always be justified in omitting to make personal inspection of the securities that are in the custody of a person or a company with whom it is not proper that they should be so left, whenever such personal inspection is possible, and, that auditors should not be content with a certificate that the securities are in the possession of a particular company, firm or person unless the company etc. is trustworthy or respectable and further is one that in the ordinary course of business keeps securities for its customers. The foregoing review discloses the following points : (i) The duty of an auditor is only verification and not detection : (ii) An auditor is not bound to be suspicious ;

1. (1900) 1 Q.B. 16, 21.
2. (1895) 2 Ch. 673 (C.A.).
3. (1925) 1 Ch. 407.

he should exercise reasonable care and skill; and this would depend on the facts of each case: (iii) An auditor is not an insurer and does not guarantee that the books of the conpany correctly show the position of the company: (iv) An auditor has nothing to do with the prudence or imprudence of making loans etc. with or without security: (v) It is not an auditor's duty to give advice either to directors or to shareholders as to what they ought to do: (vi) An auditor's duty is only to examine the accounts, ascertain that they are right and to prepare a balance-sheet showing the true financial position: (vii) If securities of the company are not in proper custody, he should inspect them personally and require that the matter is set right immediately: (viii) Where an auditor is under a duty to convey any information to the shareholders it will not suffice if he merely gives information which may induce them to ask for more. In the case under examination, the auditor was charged: (*i*) that he had not in the balance-sheet set out specifically the loans which according to him were unsecured; (*ii*) that he had not in the balance-sheet separately demarcated the debts as good, bad, and unrealisable; (*iii*) that the balance-sheet did not disclose the loans taken by the directors from the company separately and (*iv*) that accrued but unrealised interest on various loans had not been disclosed as an asset. Applying the principles set out *supra* relating to the duties of an auditor to the materials found in the case it was held that the charges were untenable.

TIRUCHENDUR SIVATHWAJA MATAM *v.* SAMI BHATTAR, (1949) 1 M.L.J. 448.

Sex and not propinquity has in the past been the deciding ground of preference in Madras in a case of conflict between male and female bandhus claiming the property of a deceased person. Excepting a few female heirs whose rights have been expressly provided for by sastraic texts or by statute law, female relations in Madras can at best inherit as "irregular bandhus" only. It has also been regarded as settled law that a male bandhu is entitled to preferecne over a female bandhu even if the latter is nearer in degree. The reason for the rule has been laid in the relatively inferior competency if not lack of it on the part of women to confer spiritual benefit. In *Kutti* v. *Radhakrishna*[1], for the fiest time it was held that consanguinity may be recognised in the case of female relations as the basis of title to succession in the absence of preferential male heirs. In *Lakshmanammal* v. *Tiruvengada*[2] where the competing claimants were a sister and a sister's son, it was argued that consanguinity having been recognised as entitling a woman to inherit there was no reason to deny its application in judging preference. Turner, C.J., remarked: "Vijnaneswara recognises the existence of the rule excluding the females in favour of preferential male heirs. This, we think, is the only reasonable explanation of the sole mention by him of male heirs except in certain stated cases. This rule sanctioning the preference of male heirs has the support of subsequent commentators accepted as of authority in this Presidency. *It has also the support of long recognised usage*" (Italics ours). It is thus not merely a question of lack of spiritual competency, but also the existence of a long-usage that led to the according of an inferior place to female bandhus. Later decisions have consistently applied the principle that a male bandhu is entitled to preference over a female bandhu though the latter may be of nearer degree, see *Narasamma* v. *Mangamma*[3], *Chinnammal* v. *Venkatachala*[4], *Ramappa Udayar* v. *Arumughath Udayar*[5], *Sundarammal* v. *Rangasami*[6]. In the last mentioned case, it was contended that the preference of a male bandhu to a female relation should at least be confined to a case where both the claimants are of the same class and ought not to be applied to a case where the female bandhu was of a nearer class and the male bandhu belonged to a remoter class. Apropos of this, Muttuswami Ayyar and Best, JJ., observed: "We are of opinion that the contention on appellant's behalf cannot

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1. 8 M.H.C.R. 88.
2. (1882) I.L.R. 5 Mad. 241.
3. (1889) I.L.R. 13 Mad. 10.
4. (1890) I.L.R. 14 Mad. 149.
5. (1891) I.L.R. 15 Mad. 421.
6. (1893) I.L.R. 17 Mad. 182.

be supported....There can be no doubt that whatever may be their rights as relatives, they cannot exclude male relatives who as bhinnagotra sapindas or regular bandhus are entitled to succeed under the Mitakshara law in preference to them. The learned pleader for appellant argues that under Hindu law males exclude females only when they belong to the same class of relatives, but to this proposition we cannot accede". In *Raja Venkata Narasimha Appa Rao* v. *Raja Suraneni Gopal Rao*[1], the rule was taken to be well settled that male bandhus are always entitled to priority over female bandhus by reason of their sex. In Bombay also the principle had been accepted, see *Balkrishna* v. *Ramakrishna*[2], *Girimallappa Channappa* v. *Kenchava*[3] though in an earlier decision—*Saguna* v. *Sadashiv*[4]—propinquity and not sex was held to determine preference between two rival claimants. In this state of the law, the Privy Council decision in *Kenchava* v. *Girimallappa*[5] fell to be rendered. The rival claimants in that case were the father's brother's daughters and the father's sister's son. Both were atma bandhus of the deceased, *ex parte paterna*. The Madras and Bombay decisions were examined by Lord Phillimore. Adverting to *Balakrishna's case*, it was observed: "The principle that among bandhus the male is entitled to preference over the female—even though the latter is nearer in degree was accepted as being law for the Bombay Presidency as for the Madras Presidency, and preference was given to a mother's sister's son over a brother's daughter. In that particular case the actual decision would appear to conflict with *Saguna* v. *Sadashiv*[4] because it apparently ignored the supposed prior and paramount claim of paternal over maternal bandhus and it would seem that for some unaccountable reason *Saguna* v. *Sadashiv*[4] was not cited to the Court. Whenever, therefore, the two conflicting principles of preference of the paternal over the maternal line and preference of the male over the female sex, in the Presidency of Bombay have to be weighed, the Court which weighs them will have to choose between these two decisions of the High Court. But it will be seen from this summary that there is no case in the Bombay Presidency which decides that some preference is not to be given to male bandhus over female. And there is no doubt—indeed, the learned counsel for the appellants did not contend that there was any doubt—that throughout the rest of India preference for the male would be certain". On these observations, it was argued in *Avudai Ammal* v. *Ramalinga Reddiar*[6] that all the older cases recognising preference on the basis of sex required reconsideration. Ramesam, J., held the contention to be untenable and that Lord Phillimore's concluding remarks in the passage extracted *supra* was practically fatal to such a contention. In Madras the position continued as before, see *Jagannadham* v. *Adi Lakshmi*[7]. In 1929 the Hindu Law of Inheritance (Amendment) Act was passed by which in all provinces subject to the Mitakshara law, the son's daughter, daughter's daughter and sister were accorded a high place in the line of heirs being accommodated in that order after the paternal grandfather and before the paternal uncle. Also the Privy Council had in *Balasubrahmanya* v. *Subbayya Tevar*[8], laid down categorically that the principle of proximity of blood relationship applies to cognatic succession and that in determining which of two atma bandhus is entitled to succeed, nearness of degree and not spiritual efficacy is the proper test to apply and religious efficacy is an admissible test of preference only when both bandhus are of equal degree. While it is true that those remarks had not been made with reference to competition between male and female bandhus, it was argued that the spiritual benefit principle being inadmissible so long as propinquity can give a lead and the relegation of female bandhus having originally been dictated by this consideration alone and there being no qualification in regard to the applicability of the propinquity test to conflicts among males only, the observations of the Privy Council in *Balasubrahmanya* v. *Subbayya Tevar*[8] and other cases must be deemed to have abrogated the rule of preference based on sex, in cases of conflict between

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1. (1894) I.L.R. 18 Mad. 193.
2. (1920) I.L.R. 45 Bom. 353.
3. (1920) I.L.R. 45 Bom. 768.
4. (1902) I.L.R. 26 Bom. 710.
5. (1924) I.L.R. 48 Bom. 569 (P.C.).
6. (1925) 97 I.C. 314: A.I.R. 1926 Mad 1163.
7. I.L.R. (1940) Mad. 734.
8. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.).

male and female bandhus. The argument has found acceptance in a recent decision of the Bombay High Court in *Kisan Dhondu* v. *Shevantabai*[1], where it was held that a brother's daughter or sister's daughter will exclude a mother's sister's son. The position has thus been stated by Chagla, C.J.: " In our opinion, the recent decisions of the Privy Council make it perfectly clear that the only test that has to be applied is the test of propinquity and that the test should not be qualified in any way and certainly not because the result of applying that test in a particular case may be the preference of a female to a male. In *Balasubrahmanya* v. *Subbayya Tevar*[2], the Privy Council held that ' the principle of proximity of blood relationship applies to cognatic succession, and in determining therefore which of two atma bandhus is entitled to succeed to the estate of a propositus, nearness of degree and not religious efficacy is the proper test to apply. Religious efficacy is an admissible test but is only applicable when atma bandhus are equal in degree ' . . . The law could not have been more clearly stated than in these words of the decision of the Privy Council. Therefore the test of religious efficacy is only permissible when the test of proximity of blood relationship fails or is not available. But if the test of proximity of blood relationship can be applied, then the Court has not to look further to consider the test of religious efficacy at all. It is also important to note that their Lordships have not suggested any qualification or limitation to the test of proximity of blood. It is true that their Lordships were not considering the case of female bandhus but it is difficult to understand why that test would not be a proper test merely because in a particular case the test was satisfied by a female bandhu being nearer in relationship to the propositus. The only reason why a female can be excluded is because she does not satisfy the test of religious efficacy. But once the Privy Council rules out the test of religious efficacy and considers the test of blood relationship to be the primary test, then no logical ground remains for excluding a female bandhu in preference to a male bandhu . . . . In our opinion the proper test to apply is to determine in which particular class a bandhu falls among the three classes enumerated by Mitakshara and preference should be given to the class enumerated first over the classes enumerated subsequently; the next test to apply would be to determine which bandhu is nearer in degree of relationship as coming within a particular class. If a female is nearer in relationship then she should be preferred to a male bandhu ". In the case under review the competing claimants were a brother's daughter and brother's daughter's son. The latter was preferred following the Madras decisions. A fresh argument seeking to reopen the earlier rule was made on the logic underlying the statutory change in the order of succession made in 1929. The argument was rejected. Presumably the Full Bench judgment of the Bombay High Court had not then been rendered and so did not fall to be considered. It may however be noted that in Madras the rule of preference of the male bandhu over the female is supported on the ground of long established usage as well and the approach here has been different. Legislative intervention is necessary to settle the differences in the matter.

JAYALAKSHMI *v.* SOUNDARARAJAN (1949) 1 M.L.J. 511.

This decision deals with an interesting point under the Special Marriage Act. Section 2 of the Act states that marriages may be celebrated under the Act upon the conditions set out therein. Condition No. 3 is that each party must, if he or she has not completed the age of 21, have obtained the consent of his or her father or guardian to the marriage. The form given in Schedule II for the purpose requires a declaration by the party that such consent has been taken and also provides for an endorsement that the declaration has been signed by the party in the presence and with the consent of the guardian. Section 17 provides that any such marriage may be declared null or dissolved in the manner provided by the Indian Divorce Act for the causes mentioned therein or on the ground that the marriage has contravened some one or more of the conditions prescribed in the

1. (1949) 52 Bom. L.R. 327 (F.B.).
2. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.).

Special Marriage Act. The question arises as to the effect of failure to procure the consent of father or guardian on the validity of the marriage. In *Basana Sen* v. *Aghore Nath Sen*[1], a Special Bench of the Calcutta High Court held that where the consent has not been taken it is but right for the Court to declare the marriage null and void. This has been taken to mean that the matter is not one in the discretion of the Court. In *Dolly Bathena* v. *Shaik Fazle Elahi*[2] this view was followed. A Special Bench of the Nagpur High Court has reached a different conclusion in *Ganesh Prasad* v. *Damayanti*[3]. There it is pointed out: *firstly*, that though the State does not recognise the sacramental aspect with which some faiths invest marriage, it realises that marriage confers a status, recognises that the consequences flowing therefrom particularly after consummation are far-reaching, especially with regard to children and that any breaking up of the marriage tie cannot be left to the choice of an individual; *secondly*, that section 17 of the Special Marriage Act by use of of the word "may" has invested the Court with discretion in granting the declaration, that where it was not intended to be a matter of discretion it has been so stated as is evident from the provision in section 15 as to bigamous marriages; and, *thirdly*, that the provisions of the Special Marriage Act are modelled upon English law under which as well as under the Indian Divorce Act the matter is discretionary. That the position in English law is such is fairly clear, *Reg* v. *Birmingham*[4], *Holmes* v. *Simmons*[5], *Prowse* v. *Spurway*[6], *Plummer* v. *Plummer*[7]. In *Caterall* v. *Sweetman*[8] the principle has been laid down generally in regard to construction of statutes relating to marriages: "The Court will not hold a nullity to be created by mere prohibitory words unless such nullity is expressly declared in the Act". For these reasons, the Nagpur High Court has taken the view that where consent of father or guardian had not been taken the marriage is not void *ab initio* or null. It may be noted that in the Hindu Widows' Remarriage Act while section 7 makes consent of guardian necessary where the remarriage is by a minor widow whose marriage had not been consummated, and declares that a marriage in contravention of the provision may be declared void by a Court of law, still, it has taken care to add that no such marriage shall be declared void if it has been consummated. Thus, in effect, lack of guardian's consent only makes the marriage voidable and not a nullity. In the instant case, the bride was below 21. The consent of her guardian, her mother, had not been taken. There was no declaration made as required in the form in the second schedule. In the words of the learned Judge "the form or what might be called the ritual prescribed for the marriage had not been carried out". Agreeing with the view of the Calcutta High Court the marriage was held to be void. It may with respect be said that the conclusion is sound. The Nagpur view overlooks that the provison making the Indian Divorce Act applicable only means that the grounds mentioned in the former Act can afford grounds for relief in respect of marriages contracted under the Special Marriage Act and also that the procedure of the former Act shall be followed, and not that the foundational conditions prescribed by the latter Act for a valid marriage under its auspices can be whittled down or made merely directory. It further overlooks the fact that Condition No. 3 in section 2 states that the minor *must* have obtained the guardian's consent to the marriage. It is interesting to note that the same view as that held in Calcutta and Madras in this matter has recently been expressed by the Bombay High Court in *Santosh Kumari* v. *Chimanlal*[9]. It was held by Bhagwati, J., that the provisions of section 2 are mandatory, that it lays down in terms the conditions under which alone a valid marriage may be calebrated, that a marriage in contravention of any of the conditions is a nullity and that where the marriage of a minor girl is solemnised without obtaining the consent of her father who is alive and available such a marriage is totally void and cannot be validated by the principle of *factum valet*.

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1. (1928) I.L.R. 56 Cal. 628 (S.B.).
2. A.I.R. 1942 Cal. 42.
3. I.L.R. (1946) Nag. 1 (S.B.).
4. (1828) 32 R.R. 332.
5. (1868) L.R. 1 P. 523.
6. (1877) 26 W.R. 116.
7. (1917) L.R. 1917 P. 163.
8. (1845) 163 E.R. 1047.
9. (1949) 52 Bom. L.R. 394.

SANKARA PURSA *v.* GOVINDA BHATTA, (1949) 1 M.L.J. 542.

The office of receiver is one where one's interest is not allowed to come into conflict with one's duty. The above decision illustrates the operation of this principle. One of two mortgagee-decree-holders had been appointed receiver of the mortgaged properties and gone into possession thereof. Subsequently there was an application for the sale of the hypotheca in execution. The decree-holders applied for leave to bid and set off the decree amount against the price. Leave was granted. The property was actually purchased by the decree-holders at the execution sale. The question arose whether the purchase was not liable to be set aside on the ground that one of the decree-holder purchasers was also a receiver who had not in the latter capacity applied for leave of the Court to purchase. The principles relating to this matter have been set out by the Court of Appeal in England in *Nugent* v. *Nugent*[1]. There a defendant in a partition action who was also a part owner of the properties had been appointed receiver by the Court and was in possession. Subsequently a mortgagee of one of the properties, a house, with a power of sale applied to the Court for possession of the house and undertook to hold the sale by public auction. The mortgagee did not however take possession but had the property sold in public auction. The receiver through an agent purchased the property for £3,000. The sale was one not in the suit in which the receiver had been appointed but at the instance of a stranger mortgagee with a power of private sale. Still it was held that the receiver's purchase was bad. Cozens-Hardy, M.R., observed: "It (the Court) proceeds upon the general rule that in cases of this kind the purchase ought not to be allowed at all, because it is a dangerous thing to allow, as in most cases it is impossible to ascertain whether the receiver has or has not taken undue advantage of his position". Fletcher Moulton, L.J., remarked: "There is no doubt as to the general principle which actuates the Court in deciding its procedure in matters of this kind. It is that nobody must allow himself to get into a position where his interest conflicts with his duty. The Court carries out this principle, not by examining each particular case and weighing the details of the conflict between interest and duty, but by certain prohibitions with regard to persons who hold positions in which such a conflict might arise; and the Court has been very severe . . . . in rules which it has made for this purpose, as, for instance, in the rule that a party to a suit cannot without leave, bid at a sale by auction in the action. Now if the Court feels justified in establishing such a rule with regard to parties in a suit, it seems . . much easier to justify a like rule with regard to the officers of the Court, who by the action of the Court, coupled of course, with their own consent have been put in a fiduciary relation to the parties in the suit. That was the case here. The receiver was in a fiduciary relation to all the parties in the partition action, and she by reason of accepting that position, might obtain knowledge which otherwise she would not possess. Having accepted that position . . . the Court has full right to control her actions, and to say that if the sale of the property takes place whether it be in the suit or not in the suit, she must not be allowed to bid without the express leave of the Court". These principles were held applicable by Curgenven and King, JJ., in *Subrahmanyam* v. *Damavarappu Reddi*[2], to a case where one of two mortgagee-decree-holders had obtained leave to bid and set off and had been subsequently appointed receiver of the mortgaged properties. It was held that leave granted on the application under Order 21, rule 72, Civil Procedure Code, to a decree-holder to bid cannot operate as leave given to him in his capacity as receiver. The learned Judges observed: "We do not think that leave given to a decree-holder as such can be taken to give him leave to bid when he is subsequently appointed receiver because the two capacities are entirely distinct". The same principles govern even if the decree-holder had been appointed receiver *prior* to his application for leave to bid and set off the decretal amount against the price and the Court was aware of his dual capacity; because the leave is granted to him *qua* decree-holder and not *qua* receiver. In *Jiteswari Dasi* v. *Sudhakrishna*[3], a

1. (1908) 1 Ch. 546 (C.A.).
2. (1935) 68 M.L.J. 597.
3. (1931) I.L.R. 59 Cal. 956.

decree-holder had been appointed receiver. He applied under Order 21, rule 72, for leave to bid. He did not however inform the Court about his receivership though the Court was aware of the fact. The Court never applied its mind to that aspect and hence the leave was held to be unavailing and the purchase bad. In *Kandaswami Goundan* v. *Subbarama Ayyar*[1], it has been pointed out that it would make no difference to the application of the principles set out *supra* even if the sale is not a Court-sale but one held by an Official Receiver ; likewise it would make no difference even if the decree-holder has ceased to be receiver before the actual sale, as, for instance, by the adjudication of the judgment-debtor. In the instant decision, it was argued that inasmuch as one of the decree-holders alone was the receiver, the sale should not at any rate be nullified as against the other decree-holder who was not a receiver and the benefit of the leave to bid granted to the decree-holders jointly should be allowed to operate so far as he is concerned. The argument was rejected on the principle that a responsibility which attaches to a trustee may extend in equity to one who is not a trustee but knowingly assists or participates in a breach of trust to the prejudice and detriment of the *cestui que trust*.

SESHAYYA *v.* SEETHARAMAMMA, (1949) 1 M.L.J. 545.

A point of great practical importance is dealt with in this case. Succession to office-holders or servants of a temple is governed by section 58 of the Madras Hindu Religious Endowments Act of 1926. According to its provisions, where the office is hereditary, the next in the line of succession is to be the successor. If there is a dispute respecting the right to succession, etc., clause 3 provides that the trustee shall have regard to the claims of the members of the family, if any, entitled to the succession. The section contemplates only a single office-holder. In the Madras Proprietary Estates Village Services Act, 1894, and the Madras Hereditary Village Offices Act, 1895, it is expressly laid down that succession shall devolve on a single heir according to primogeniture governing succession to impartible zemindaris. The provision in section 15 of the former Act is also instructive in the context. The same principle seems to underlie section 58 of the Hindu Religious Endowments Act. It would therefore follow that any service inam or emoluments attached to the office would be the subject of individual enjoyment by the incumbent. It would, however, be a different question if the holder has the right to partition the inam among the members of the family and whether they in their turn can sub-partition so as to vest in each member of the family a hereditary right in the emoluments of the office. Before the passing of the Religious Endowments Act the general Hindu law had recognised such partition. Section 58 of the Act merely recognises a hereditary right to the office in the office-holder's family. It does not in terms deal with the emoluments of the office. Section 44-B provides for resumption of the religious service inam only if it is alienated. The case of partition is not covered by the section. Section 79 provides *inter alia* for the saving of any rights to which any office-holder may by custom or otherwise be entitled. It has been pointed out that though no doubt hereditary offices are treated by the Hindu writers as indivisible, modern custom has sanctioned such partition as can be had of such property by means of the performance of the duties of the office and the enjoyment of emoluments in rotation by the members of the family, *Mitta* v. *Neerunjun*[2]; *Mancharam* v. *Pranshankar*[3]; *Meenakshi* v. *Somasundaram*[4]. The case under review has sounded a different note. It declares it will be illegal for the trustee to recognise any partition of a religious service inam subsequent to the enactment of section 58 of the Madras Hindu Religious Endowments Act and no suit on the basis of any such partition will now be competent. With all respect, it may be submitted that there is little warrant for the conclusion so indicated. It is interesting to note that in *Suryanarayanacharyulu* v. *Seshammal*[5], Subba Rao, J. observed : "It is also not disputed that in the case of hereditary archaka inams the office is held by the heirs jointly, and by mutual arrangement they perform services by rotation or convenient

1. (1943) 1 M.L.J. 193.
2. (1874) 14 Ben.L.R. 166.
3. (1882) I.L.R. 6 Bom. 298.
4. (1921) I.L.R. 44 Mad. 205.
5. (1949) 2 M.L.J. 75.

turns. It is also a well-known incident of these grants whether sanctioned by custom or otherwise, that the members of the family partition the properties between themselves and such partitions are recognised by the Courts so long as services for which grants are made are regularly performed. The office is jointly enjoyed by all the heirs and for convenience it is performed by turns. The property pertaining to the office can be partitioned among the office-holders so long as the services are duly performed. Only the alienation of the property is prohibited."

VENKATARAYUDU *v.* SESHAMMA, (1949) 1 M.L.J. 552.

This case holds that the refusal by a sapinda of consent to an adoption by a widow on the ground that the boy proposed to be adopted was not a sapinda or sagotra or gnati will not be a proper refusal and an adoption made with the consent of remoter sapindas in such a case will be valid. It is well settled that the adoption of a stranger though there are near relations is perfectly valid, *Wooma Dass* v. *Gokulanand*[1], *Babaji* v. *Bhagirathibai*[2], *Dharma* v. *Ramakrishna*[3]. In the first of these cases, the Privy Council stated the argument as follows : " The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullodhur's sapindas, made in violation of the preferential right of Dinobundhoo, the only son of Juggunnath, who was Hullodhur's brother by the whole blood, to be adopted ". The Privy Council recognised that both the Dattaka Chandrika and the Dattaka Mimamsa had prescribed that if a brother's son is available he shall be adopted. But following the opinion of the European writers, Strange, Macnaghten and Sutherland, it was held that the selection of a boy is a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred and that the injunction to adopt one's own sapinda and failing him alone to adopt out of one's gotra is not essential so as to invalidate the adoption in the event of a departure from the rule. It would seem to follow from this statement of the law that there should be no objection to the validity of such an adoption, namely, of a stranger in preference to relations, even where the adoption is by a widow. The fact that it is not the husband but his widow that makes the adoption can hardly affect the position. In *Subrahmanyam* v. *Venkamma*[4], there is, however, an observation of Benson and Bashyam Ayyangar, JJ. : " There is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda if there be no reasonable objection to the adoption of his own son ". The observation was *obiter*. It does not allow for the view expressed by the Privy Council in *Wooma Dass's case*[1] that the rules advocating selection of particular boys are only of an advisory character. The observations in *Subrahmanyam* v. *Venkamma*[4], were considered in *Sundara Rama Rao* v. *Satyanarayanamurti*[5]. After pointing out that the observations were *obiter* Satyanarayana Rao, J., remarked : " After all the boy proposed to be adopted should be one whom the widow expects or finds a reasonable expectation that he would be affectionate and attached to her. All these are matters which have to be considered before selecting the boy. It cannot, therefore, be said that the refusal of the widow in all cases to accept the son of the sapinda in adoption was not justified." In view of the considerations set out above, the opinion expressed in the instant case, that the refusal of consent on the ground that the boy selected was not a sapinda, sagotra or gnati is not proper, is fully in accord with authority.

MUHAMMAD IBRAHIM *v.* ABDUL HAFEEZ SAHIB, (1949) 2 M.L.J. 114.

The jurisdiction of Courts to entertain proceedings for judicial inquisition as to lunacy is dealt with in Part III of the Indian Lunacy Act, 1912. Jurisdiction

1. (1878) L.R. 5 I.A. 40 : I.L.R. 3 Cal. 587 (P.C.).
2. (1869) 6 Bom.H.C. (A.C.J.) 70.
3. (1886) I.L.R. 10 Bom. 80.
4. (1903) 13 M.L.J. 239 : I.L.R. 26 Mad. 627.
5. (1949) 2 M.L.J. 199.

outside Presidency towns is conferred by section 62 upon District Courts within whose local jurisdiction the alleged lunatic may be residing. The meaning of the term 'residing' in the context of the Act has often been the subject of judicial interpretation. Residence has been made a relevant factor for purposes of different enactments. The Indian Divorce Act, the Indian Income-tax Act and other enactments have used "residence" as a test of jurisdiction or liability. It would be idle to attribute to the term a uniform meaning. The term derives its colour essentially from the context in which it is employed. In *Anilbala Chowdhurani* v. *Dhirendranath Saha*[1] there is an interesting exposition of the meaning of the term. Mookherji, A.C.J., observes: "The terms 'reside' and 'residence' have been the subject of judicial consideration on diverse occasions and in relation to a variety of circumstances. The expression 'to reside' has been held to signify 'to dwell permanently or for a considerable time', 'to have a settled abode for a time', 'to abide continuously', 'to have one's domicile or home', 'to remain for a long time'. The term 'residence' has been taken as equivalent to 'the abiding or dwelling in a place for some continuance of time', and it has been said that to constitute a residence there must be a settled fixed abode or intention to remain permanently, at least for a time, for business and other purposes . . . . The term 'residence' is an elastic word, of which an exhaustive definition cannot be given; it is differently construed according to the purpose for which enquiry is made into the meaning of the term; the sense in which the term is used is controlled by reference to the object. . . But whatever definition may be framed or adopted there is one fundamental point of view which must not be overlooked. The term 'residence' may be used in two senses, the one denoting the personal habitual habitation, the other the constructive, technical and legal habitation. When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides; the places of his legal and personal residence are the same. When, on the other hand, a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can be equally no doubt as to the place where he resides; he must be considered as residing where he actually or personally resides. But some individuals have permanent habitations where their families constantly dwell; yet they pass great portions of their time in other places, and the word 'reside' may, with respect to such persons, be used in relation to either their personal or their legal residence. From this point of view it is manifest that one may have two places of residence". Section 20 (*b*) of the Civil Procedure Code which makes the place of residence of the defendant the basis of jurisdiction has an Explanation attached to the section recognising that a person may have at the same time more than one residence. The same position has been considered to operate in regard to section 62 of the Lunacy Act, *Radharani Debi* v. *Nibaran Chandra Mukherji*[2]. A person may have a permanent residence as distinguished from a temporary residence or residences. Even temporary residence may suffice for jurisdictional purposes. In *Srinivasa Moorthy* v. *Venkatavarada Ayyangar*[3] it was held by the Privy Council that a person domiciled in Mysore taking up his abode with his wife and family in a hired house in Madras with the object of remaining there for several months and so remaining could be considered as "dwelling" within the jurisdiction of the High Court for purposes of clause 12 of the Letters Patent. In *Radharani Debi's case*[2] the Calcutta High Court held that temporary residence outside will not oust the jurisdiction of the Court within whose local limits the alleged lunatic had his permanent residence as well as properties, to entertain an application under section 62 of the Lunacy Act. B. B. Ghose and Panton, JJ., observed: "It is beyond question that the alleged lunatic is a permanent resident within the jurisdiction of the Court of Birbhum. He has properties in that district and his wife seeks for being appointed guardian of his properties for the purpose of protecting those properties from being sold in execution of decrees obtained by creditors. It is true that the lunatic is at present confined in the Mental Hospital at Ranchi and for that purpose he may

1. (1920) I.L.R. 48 Cal. 577 (F.B.).
2. A.I.R. 1929 Cal. 512.
3. (1911) 21 M.L.J. 669 : L.R. 38 I.A. 129 : I.L.R. 34 Mad. 257 (P.C.).

be held to be residing at Ranchi which is beyond the jurisdiction of this Court, but a person may have two residences. Because under certain circumstances he has been placed in the Mental Hospital at Ranchi, it cannot be said that he has abandoned his residence within the district of Birbhum. So he must be held to be a resident within the district of Birbhum notwithstanding the fact that he is temporarily residing at Ranchi". The jurisdiction of the Court in this behalf will not be lost even if the Court within whose jurisdiction the person is temporarily resident has passed a reception order, *Kamala Bala Debi* v. *Emperor*[1]. In the case under review, the alleged lunatic had his permanent residence in Tanjore District, his parental home being there. He had been taken away from there by the respondent and was staying with him for about three years prior to the petition under section 62. In the circumstances, it was held that the latter fact would not put an end to the legal residence of the alleged lunatic within the Tanjore District and the petition was competent.

GOVERNMENT OF BOMBAY *v.* P. A. WADIA, (1949) 2 M.L.J. 161 (P.C.).

One of the points laid down by the Privy Council in the above case was that the provisions of section 80 of the Civil Procedure Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. This is but a repetition of what had already been forcefully stated in decisions like *Bhagchand Dagadusa* v. *Secretary of State for India*[2], and *Gaekwar of Baroda State Railway* v. *Hafiz Habib ul Haq*[3], where it had been held that the provisions of section 80 were express, explicit and mandatory and admitted of no implications or exceptions. The statement of law so made provoked the question whether it would be competent to the party entitled to the notice to waive the notice or any irregularity concerning it. On this matter there had been a conflict of judicial opinion. The Madras view was there could be no waiver. The other High Courts took a different view. The conflict was however resolved by the Privy Council itself in *Vellayan Chettiar* v. *The Province of Madras*[4]. Referring to the decision delivered by Lord Sumner in *Bhagchand's case*[2], Lord Simonds observed: "In the case of *Bhagchand Dagadusa* v. *Secretary of State for India*[2], to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordships' opinion, be regarded as deciding that it is not competent for the authority for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court, and that they may be waived by the authority for whose benefit they are provided". The case having squarely raised the question whether the view of the Madras High Court or the contrary view of the other High Courts on the point of waiver was correct, it may now be taken to be established that a plea of the want of notice required by section 80, or a plea that a notice issued does not conform to the requirements of that section may be waived by the Government or public officer entitled to such notice, *Venkataswami* v. *Mahalakshmi*[5]. In the case under review there was no question of waiver and hence no question of conflict between strict construction and plea of waiver.

SANKARANARAYANAN *v.* POOVANANATHASWAMI TEMPLE, KOILPATTI, (1949) 2 M.L.J. 171 (F.B.).

In deciding that a *de facto* trustee in possession and management of the properties of a temple or mutt is competent to institute a suit for the recovery of the properties belonging to the institution and take such other action as may be necessary in its interests, the above case sets at rest conflicting views on this matter in Madras.

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1. A.I.R. 1931 Cal. 711.
2. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 (P.C.).
3. (1938) 2 M.L.J. 208 : L.R. 65 I.A. 182 : I.L.R. (1938) All. 601 (P.C.).
4. (1947) 2 M.L.J. 208 : L.R. 74 I.A. 223 (P.C.).
5. (1949) 1 M.L.J. 602.

The case is also noteworthy for interesting and radical differences in approach to any appreciation of cognate matters on the part of the learned Judges. While Viswanatha Sastri, J.'s comment on the view in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[1], equating a *de facto* trustee with a trustee *de son tort* was that that it paid " an exaggerated compliment to the legal cobwebs of an alien system " and " a scanty attention to the well established and well understood principles of Hindu Law" on the subject (p. 177), Raghava Rao, J., on the other hand was " prepared to accept the assumption as correct " (p. 190). Again, while Viswanatha Sastri, J., observed : "A fugitive or isolated act of a person with regard to the property of a religious endowment would not make him a *de facto* trustee. One swallow does not make a summer " (p. 187), Raghava Rao, J., remarked : " Where and how are we to draw the line between a manager *de facto* and a manager *ad hoc* exercising isolated acts on particular occasions ? I respectfully agree with my learned brother Viswanatha Sastri, J., in his picturesque observation that one swallow does not make a summer ; but the practical question still remain how many do ?" (p. 193). And Rajamannar, C.J., pointedly stated : " We are not asked to define who can be described as a *de facto* trustee " (p. 173).

It is clear that the English law relating to public trusts and the principles applicable in India to public religious endowments are radically different. A trust in English Law postulates a *conveyance* of property to the trustee and the *vesting of the legal title* to the property in him, for the benefit of the *cestui que trust*. To constitute a valid dedication, a conveyance by the dedicator to another is not required and an appropriation for a specific, religious or charitable purpose is all that is necessary, *Vidyavaruthi* v. *Baluswami Iyer*[2]; *Hemanta Kumari Debi* v. *Gowri Sankar*[3]; *Sankaranarayana* v. *The Hindu Religious Endowments Board*[4]. A Hindu Religious endowment is a complex concept. In the case of a temple the property vests in the idol which is a juristic entity, *Pramathnath Mullick* v. *Pradyumna Kumar Mullick*[5]. It can however from its very nature only act through a human agency, variously known as shebait, dharmakarta or manager, *Prasanna Kumari Debya* v. *Golabchand Baboo*[6]; *Jagadindranath Ray* v. *Hemanta Kumari Debi*[7]. *Damodar Das* v. *Lakshan Das*[8]. By whatever designation known, the latter is not the person in whom the legal title vests, *Maharanee Shibessouree Debia* v. *Acharje*[9]. The legal title is with the idol. Likewise the head of a Mutt is not exactly a trustee. And it would make no difference even if he had a beneficial interest in the usufruct of the properties belonging to the institution to any extent. *Ponnambala* v. *Periannan Chetti*[10]. In either case the analogy is to that of a person having a manager to carry on the administration of his properties and affairs. In *Vidyavaruthi* v. *Baluswami Iyer*[2], it was observed by the Judicial Committee : " When the gift is directly to an idol or temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol of the institution. In no case was the property conveyed to or vested in him, nor is he a ' trustee ' in the English sense of the term, although in view of the obligations and duties vesting in him, he is answerable as a trustee in the general sense, for mal-administration." It was further stated : " Neither under the Hindu law nor under the Mahomedan system is any property ' conveyed ' to a shebait or a mutawalli in the case of a dedication. Nor is any property vested in him ; whatever property he holds for the idol or institution he holds as manager with certain beneficial interests regulated by custom and usage." Their Lordships sum up the legal position thus : " From the above review of the general law relating to Hindu and Mahomedan pious institutions, it would *prima facie* follow that an

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1. (1938) 2 M.L.J. 663.
2. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 34 Mad. 831 (P.C.).
3. (1941) 2 M.L.J. 1 : L.R. 61 I.A. 53 : I.L.R. (1941) All. 401 (P.C.).
4. (1948) L.R. 74 I.A. 230 : I.L.R. (1948) Mad. 585 (P.C.).
5. (1925) 49 M.L.J. 30 : L.R. 52 I.A. 245 : I.L.R. 52 Cal. 809 (P.C.).
6. (1875) L.R. 2 I.A. 145 (P.C.).
7. (1904) L.R. 32 I.A. 203 : I.L.R. 32 Cal. 129 (P.C.).
8. (1910) 20 M.L.J. 624 : L.R. 37 I.A. 147 : I.L.R. 37 Cal. 885 (P.C.).
9. (1869) 13 Moo.I.A. 270 (P.C.).
10. (1936) 71 M.L.J. 105 : L.R. 63 I.A. 261 : I.L.R. 59 Mad. 809 (P.C.).

alienation by a manager or superior, by whatever name called, cannot be treated as the act of a 'trustee' to whom property has been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by a 'trustee' in English law." The position of the idol is thus that of a legal owner and the position of the so-called trustee of the temple or other religious or charitable institution is that of a mere manager, *Venkateswara* v. *Venkatesa*[1]. It is because of these differences between the English law of public trusts and the principles applicable to Hindu religious endowments that the worshippers, the Advocate-General, a prospective shebait or any other person interested in the temple, mutt or other institution are allowed to institute suits for the enforcement of the rights of the temple, mutt or institution. In the case of the worshippers the right arises presumably from the fact that they are the beneficiaries "in a spiritual sense" (see *Vidyapurna* v. *Vidyanidhi*[2]) ; in the case of the Advocate-General and the relators the right is statutory ; in the case of a prospective shebait the interest accrues possibly by reason of his being as it were in the line of succession (*Tarit Bhusan* v. *Sridhar Thakur*[3]). Apart from these classes of persons it has been held in several cases that a person who is a *de facto* trustee of a temple or institution has a similar right. In *Appasami Pillai* v. *Ramu Thevar*[4], Ramesam, J., observed: "A *de facto* manager of the trust should be allowed to maintain a suit which is for the benefit of the trust in spite of some defect in his title as trustee." The expression '*de facto* trustee' is not found generally used in English decisions though text-writers have suggested it as a more appropriate term to describe a trustee *de son tort*[5]. It is however of interest to note that in *Ponnambala* v. *Periannan Chetti*[6], the position of the person who functioned as the head of the Kunnakudi Mutt from 1902 to 1913 without legal title thereto was referred to by the Privy Council as '*de facto* managership.' Likewise in *Ishwar Ramachandra* v. *The Bengal Duars Bank, Ltd.*[7], the Privy Council described the suit before the Board as one by a *de facto* shebait of an idol for the recovery of property. It is also indisputable that the term '*de facto* trustee' has been widely employed in this country as a very convenient expression to refer to a person who without any strict legal title has been in *bona fide* possession of the properties of an institution in its interests or whose legal title has been subsequently found wanting. In at least two cases, a person who had been in such management and possession of an institution was held by the Judicial Committee to be competent to maintain an action for the recovery of property for the benefit of the institution. In *Mahant Ramcharan Das* v. *Naurangi Lal*[8], one Rampat Das was the mahant of the Paliganj mutt. He had granted a permanent lease of about 70 acres of land in 1909. The lands belonged to the mutt. Two years later he sold those lands subject to the lease. There was no justification either for the lease or for the subsequent sale of the properties of the institution. In 1913 Rampat Das died and one Sant Das took possession of the mutt as his successor. In 1916, Sant Das surrendered all his rights to the mutt and its headship to the plaintiff who was the head of another mutt. The plaintiff accordingly took possession of the Paliganj mutt claiming that since Rampat Das had died without leaving behind him any disciple he had become entitled to the mutt and its properties. On that footing he sued for the recovery of possession of the 70 acres of land alienated by Rampat Das. The Privy Council held that the Board were not concerned with any question of title as there was a concurrent finding of the Courts below that the plaintiff was "the person in actual possession of the Paliganj mutt and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the mutt". The principle was

1. (1941) 1 M.L.J. 644 : I.L.R. (1941) Mad. 599 (F.B.).
2. (1904) 14 M.L.J. 105 : I.L.R. 27 Mad. 435, 451.
3. (1947) 51 Cal. W.N. 383.
4. (1936) 61 M.L.J. 887, 893.
5. Maitland, Equity, 2nd edn., p. 232.
6. (1936) 71 M.L.J. 105 : L.R. 63 I.A. 261 : I.L.R. 59 Mad. 809 (P.C.).
7. I.L.R. (1941) Kar. 51 : A.I.R. 1941 P.C. 33 (P.C.).
8. (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124 : I.L.R. 12 Pat. 251 (P.C.).

repeated in *Mahadeo Prasad Singh* v. *Karia Bharti*[1]. That was also a case of unauthorised alienation of mutt property by the mahant. After his death its validity was questioned by the person who had taken possession of the institution as successor to the deceased mahant. The Privy Council observed: "There can be little doubt that Karia (plaintiff) had been managing the affairs of the institution since 1904, and has since the death of Rajbans been treated as its mahant by all the persons interested therein. The property entered in the revenue records in the name of Rajbans was, on his death mutated to Karia, and it is not suggested that there is any person who disputes his title to the office of mahant. In these circumstances their Lordships agree with the High Court that Karia was entitled to recover for the benefit of the mutt the property which belonged to the mutt and is now wrongly held by the appellants. They are in no better position than trespassers. As observed by this Board in *Mahant Ramcharan Das* v. *Naurang Lali*[2], a person in actual possession of the mutt is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the mutt". In *Vedakannu Nadar* v. *Ranganatha Mudaliar*[3], Venkatasubba Rao and Abdur Rahman, JJ., took the view that a *de facto* trustee as such had no *locus standi* to maintain such a suit on behalf of the trust as he was in their opinion no better than a trespasser himself. The Privy Council decisions set out above were however not noticed. This view was followed by Horwill, J., in *Vasudeva Rao* v. *Packiri Mohammed*[4], where the Privy Council decisions were distinguished as not involving any question as to who should hold the office or who was entitled to bring the suit for the recovery of the properties of the mutt alleged to be unawfully alienated. The Full Bench in the instant case felt that this distinction is not warranted inasmuch as the facts of the two Privy Council cases clearly show that the competency of the persons who brought the suit was in fact challenged. The view of the Full Bench overruling these two Madras decisions thus rests on solid foundation. As to the rationale of the rule permitting a *de facto* trustee in possession and management of a temple or mutt to bring a suit for the recovery of properties belonging to the institution in the interests of the trusts, Rajamannar, C.J., has approved the statement on this matter by Wadsworth, J., in *Subramania Gurukkal* v. *Abbinava Poornapriya Srinivasa Rao Sahib*[5]: "It is the duty of the Court to protect trust property from misappropriation and diversion from the objects to which it was dedicated. When trust property is without a legal guardian owing to any defects in the machinery for the appointment of a trustee or owing to the unwillingness of the legal trustee to act, it would be a monstrous thing if any honest person recognised as being in charge of the institution and actively controlling its affairs in the interests of the trust should not be entitled, in the absence of any one with a better title to take those actions which are necessary to safeguard the objects of the trust". Raghava Rao, J., has put the matter in a somewhat different form. He has observed: "Apparently the Privy Council proceeded . . . . . . on the view that possession of the institution and management of its affairs is itself good title effective to clothe anybody who has such possession and management with the right to institute suits for recovery, not merely of property of which he or the institution represented by him gets dispossessed after his assumption of management, on the basis of possessory title well known to law . . . . ; but also of trust property which had before such assumption of management been wrongfully alienated or otherwise passed out of the possession of the head of the mutt or the idol of the temple. Presumably the interests of the institution have been regarded by the Privy Council as so far paramount as to justify the conclusion that a *de facto* manager should in the absence of a *de jure* manager be allowed the right to maintain such suits, and it would require more than ordinary courage on the part of any one to suggest that such a point of view which finds warrant in principle as well as decisions of the highest authority binding on all Courts in India is still open to consideration here and now."

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1. (1934) 68 M.L.J. 499: L.R. 62 I.A. 47: I.L.R. 57 All. 159 (P.C.).
2. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
3. (1938) 2 M.L.J. 663.
4. (1944) 1 M.L.J. 35.
5. A.I.R. 1940 Mad. 617.

PARANDHAMIAH *v.* NARASIMHA RAO, (1949) 2 M.L.J. 197.

This case holds that the provisions of section 235 of the Indian Companies Act will apply also to a case of voluntary liquidation. No doubt the section occurs in Part V of the Act dealing with 'Winding up' but is placed under the head "Supplemental provisions". Broadly speaking the object of the section may be said to deal with misfeasance by delinquent directors, liquidators, etc. Such proceedings could be moved for at the instance, among others, of a creditor or contributory. Section 155 which also is found in the same chapter but is placed at its very commencement recognises that winding up may be either (i) by the Court, or (ii) voluntary, or (iii) subject to the supervision of the Court, and expressly provides: "the provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes". The short point that arises on these provisions is whether section 235 could be applied to a voluntary winding up. Section 216 provides for a creditor or contributory applying to the Court to determine any question arising in the winding up or to exercise, as respects the enforcing of calls, staying of proceedings, or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. The section obviously deals with a Court's powers in a voluntary winding up. And in *Muzaffer Hussain* v. *Hakim Rai*[1], it was held by Mahajan, J., that the words 'or any other matter' in section 216 should be read *ejusdem generis* with the enforcing of calls and the matters following it and therefore the public examination of a director could not be ordered at the instance of a voluntary liquidator. In *Liquidator, Janda Rubber Works Ltd.* v. *Collector of Bombay*[2], it had been held that under section 216 the powers of the Court are limited to determine the questions mentioned therein. Can it then be said that section 216 dealing with the Court's powers in the case of a voluntary winding up should be read either as excluding or in any event as controlling the applicability of the provisions of section 235 to a voluntary winding up? The following reasons suggest a negative answer. For one thing, while in all sections dealing with a compulsory winding up the word 'official liquidator' is employed, in section 235 the term used is 'liquidator', thereby implying that the section has a larger operation than to cases of compulsory winding up only. Secondly, the utter dissimilarity between the several matters enumerated in section 216 would seem to forbid any *ejusdem generis* construction in the manner suggested by Mahajan, J. It is also noteworthy that in *Shaw Brothers* v. *Army Canteens Board*[3], it was held that the powers of a Court under section 215 of the Companies Act (now section 216) are exactly the same as those with which the Court is seised in a case of compulsory liquidation, and in *Nowroji Pudumji* v. *Laxman Moreshwar*[4], it was held that under that section the liquidator might apply for the public examination of a director. Lastly, section 235 is almost a reproduction of section 215 of the English Companies Act which had replaced with slight modifications section 10 of the Companies (Winding up) Act, 1 of 1890, which, in its turn had been substituted in the place of section 165 of the Companies Act, 1862. In the comparable context of these sections, decisions of English Courts have held that misfeasance proceedings will lie even in the case of a voluntary winding up. In *In re County Marine Insurance Co. Rance's case*[5], it was decided that the Court has a summary power in a voluntary winding up on a liquidator's application, to order a director to repay a dividend of bonus declared and paid to him under a delusive balance sheet. Likewise in *In re Home & Colonial Insurance Co. Ltd.*[6], Maugham, J., held that a misfeasance summons taken out at the instance of a creditor against the liquidator of a company under section 215 of the present English Companies Act, claiming in the voluntary winding up a declaration as a result of which the liquidator would become liable to pay a sum of £ 38,000 and odd, will be perfectly competent. Earlier decisions in England had held that there is no difference between a voluntary winding up and

1. A.I.R. 1947 Lah. 283.
2. (1949) 3 D.L.R. (Simla) 131.
3. A.I.R. 1931 Lah. 500.
4. (1919) I.L.R. 44 Bom. 659.
5. (1870) L.R. 6 Ch. A. 104.
6. L.R. (1930) 1 Ch. 102.

a winding up under supervision regarding the powers exercisable by the Court in such cases—*In re Bank of Gibraltar and Malta*[1], and per Lord Rolt in *In re Beaujolais Wine Co.*[2]. Thus in England it made no difference to the powers of the Court in regard to the issue of misfeasance summons, whatever may be the mode of liquidation, voluntary, compulsory or under supervision. The Indian statutory provisions being modelled on those of the English Companies Act and being on this matter almost a reproduction of the English provisions, the ruling in the instant case is in accord with the view of the English Courts.

HANUMANTHAPPA *v.* ERRANTI SEETHAYYA & CO., (1949) 2 M.L.J. 217 (F.B.).

According to the Civil Procedure Code, once a decree is passed, any money payable thereunder shall be paid either (*a*) into the Court whose duty it is to execute the decree; or, (*b*) out of Court to the decree-holder; or, (*c*) otherwise as the Court which made the decree directs (Order 21, rule 1, sub-rule (1)). Also where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly (rule 2, sub-rule (1)). By virtue of section 13 (2) of the General Clauses Act, the term "decree-holder" will mean "decree-holders" where there is a plurality of them. It is equally clear that the term "decree-holder" will in the context include any agent of the decree-holder also. It may well be that payment of the decree amount takes place out of Court. In such a case, if there happen to be two or more decree-holders, payment to one of them alone will not be a valid payment which can be certified unless the person receiving the money is an agent of the others. Should such agency be special and post-decretal or can it be general and even pre-decretal? It is well known that as between partners, they are all the while when they are carrying on the business of the firm agents as well as principals (sections 18 and 19, Partnership Act). Thus, if a firm has lent moneys, it is competent to any of the partners to receive payment of the debts from the debtors and grant a valid discharge so as to bind the other partners. The question is whether such powers will be affected by reason of the debts having become mereged in decrees obtained against the debtors, in other words, whether there is anything in the Civil Procedure Code to preclude the applicability of the substantive law of agency subsisting among partners to the realisation of decree debts. Order 21, rule 15 provides: (i) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all; (ii) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of persons who have not joined in the application. The provision is general and *prima facie* applicable to all joint decree-holders. It is however not clear whether it is intended to limit the substantive law under which, for instance, in the case of partners each partner is in law an agent of the rest. Principles of substantive law should no doubt not intrude into special fields. But admittedly rule 15 does not refer to anything which might happen outside Court and without the assistance of the Court being sought. The use of the term 'may' in rule 15 would show that the provision is an enabling one. It looks as if the rule is directed at execution at the instance of one of several co-decree-holders for the benefit of all of them where there is no question of any mutual or other agency subsisting between them. If a partner resorts to the Court to realise a decree passed in favour of all the partners, the Court may no doubt impose terms but that cannot affect the right of a partner decree-holder to receive the decretal amount outside Court and grant a valid discharge.

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1. (1865) L.R. 1 Ch. 69.
2. (1867) L.R. 3 Ch. 15.

There are no doubt instances of supersession of substantive law by express provisions in the Civil Procedure Code. A well known instance is that of the manager of a joint Hindu family comprising minors or the father of minor sons who is appointed guardian *ad litem* of the minors in a suit. In such a case the powers of the manager under Hindu law are held to be controlled by Order 32, rule 7 and he cannot without leave of the Court enter into any agreement with reference to the suit on behalf of the minors, however *bona fide* may be his act, *Ganesh Row* v. *Tuljaram Row*[1], and *Jumna Bi* v. *Vasantha Rao*[2]. This is because the person stands invested with two capacities, one under the common law of the parties and the other by statutory provision, and under the circumstances the latter was held to be paramount. But where there is no such dual role and the manager has not been appointed guardian *ad litem*, his powers under the ordinary law remain unimpaired and he could receive payment of a debt due to the family and grant a discharge so as to bind the minors, *Ramalinga Chettiar* v. *Radhakrishna Chettiar*[3]. In *Fatmabi* v. *Tukabai*[4], it has however been held that an adjustment of the decree entered into by one of the decree-holders as manager was not binding on the others, the authority under the general law not being sufficient in such cases. In the case of a partner receiving payment outside Court of the amount due in respect of a decree in favour of a firm there is no question of conflicting capacities of common law capacity and a statutory capacity. His very agency is the creature not of common law merely but also of the statute—the Partnership Act. In the circumstances, the opinion expressed by the Full Bench, that a partner is not precluded from receiving payment of decretal amount and giving a valid and binding discharge, seems to be fully in accord with the spirit of the provisions both of Partnership law and of the Procedure Code.

NARAYANA REDDI *v.* GOPALAREDDI, (1949) 2 M.L.J. 243.

It is often found that the simpler a matter is the more frequently it tends to come up before the Courts. One such matter is the question of appellate interference with costs. Section 35 of the Civil Procedure Code lays down that costs are in the discretion of the Court. And ordinarily costs follow the event. Where there is a deviation from the principle, the Court shall state its reasons in writing. An appellate Court rarely interferes with the discretion exercised by the trial Court. The English practice is stated by Bovill, C.J., in *Hill* v. *Peel*[5]. The learned Chief Justice observed : "Where a principle is involved the Court will always entertain the question, and if necessary, give directions to the Master ; but, where it is a question of whether the Master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to shew that the officer is wrong in the judgment he has formed ". The same view was taken by the Bombay High Court in regard to interference with the discretion exercised by the taxing-officer in taxing the costs, in *Langley* v. *D'Arcy*[6] where it was stated that it is well established that a Court will not in general interfere with the order of taxation that depends on the discretion of the Master and only when a principle is involved the Court will interfere. How the matter was treated once and what the present practice is are neatly set out in *Radhey Shiam* v. *Behari Lal*[7]. There the learned Judges of the Allahabad High Court observed : "At one time it was thought that a Court of appeal would never interfere with such discretion ; but where the Judge has given his reasons and all the circumstances are before the Court of appeal, it is now settled that the Court of appeal can, if satisfied that the discretion has not been judicially exercised interfere with it and make the order which the Court below ought to have made ". Apropos of this matter in *Kameshwar Singh* v. *Nebilal Mistri*[8] it was pointed out : "Section 35, Civil Procedure Code, deals with the

1. (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).
2. (1916) 31 M.L.J. 18 : L.R. 43 I.A. 99 : I.L.R. 39 Mad. 409 (P.C.).
3. (1935) 70 M.L.J. 700.
4. I.L.R. (1945) Nag. 242
5. (1870) L.R. 5 C.P. 172, 181.
6. (1929) I.L.R. 54 Bom. 62.
7. (1918) I.L.R. 40 All. 558.
8. (1944) I.L.R. 23 Pat. 927.

Court's powers regarding costs, and the substantial portion of the section directs the costs shall be in the discretion of the Court. Where discretion has been properly exercised the appellate Court . . . . will not interfere with the exercise of that discretion. The discretion given is, however, a judicial discretion to be exercised in accordance with definite principles. It has however been held in many cases that where a principle is involved the Court will always interfere ". Thus an appellate Court will review the order of a trial Court on costs only if there is a principle involved or where discretion has not been exercised judicially. As stated by the Bombay High Court in *Ranchordas Vithaldas* v. *Bai Kasi*[1] and *Laxmibai* v. *Radhabai*[2], appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs only when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all. The lower Court must have proceeded on " a manifestly wrong ground " in the matter, *Avad Narain* v. *Badri Prasad*[3]. It follows therefore that an appeal raising the question of costs will be incompetent where no question of the nature mentioned above is involved, *Umesh Chandra Dutt* v. *Bibhuti Bhushan Pal*[4]. The case under review in following these principles emphasises that where the trial Court has in fact exercised its discretion in regard to the award of costs the appellate Court will not interfere merely because it would itself have exercised the discretion in a different way. An appeal will lie only where the trial Court's order as to costs involves a matter of principle, or where there has been no real exercise of discretion, or where the order as to costs has proceeded upon a misapprehension of fact *or law*.

KRISHNIYA CHETTY *v.* VARADACHARI, (1949) 2 M.L.J. 246.

This decision enunciates a duty to be observed by members of the Bar. It lays down that it is incumbent on a legal practitioner to report the death of his client in a pending cause before the Court on his being informed about it. It is recognised that there " is no rule of law or procedure enjoining a simple obligation of this kind on a member of the Bar ". Still it is said that inasmuch as all court procedure and posting of cases proceeds on the assumption that advocates with subsisting vakalats represent living clients, it would not be open to an advocate knowing that his client is dead to make no report about it and to wait for the stautory period of ninety days to expire and then come forward on behalf of the legal representatives in strenuous opposition to a petition to set aside the abatement condoning the delay. In England, the rules of the Supreme Court expressly provide that a solicitor is under an obligation to furnish without delay to the officer by whom the list in which the action has been entered is kept all available information relating to any settlement or likelihood thereof[5]. This is so because every legal practitioner is in a sense an officer of Court and is under a duty to assist the Court. It is in virtue of this feature inherent in the status of a legal practitioner that the instant decision presumably postulates the obligation of the legal practitioner to inform the Court about his client's death provided of course he has received credible information himself about such death.

NARASAMMA *v.* RAMA NAIDU, (1949) 2 M.L.J. 251.

This is a decision under the Lunacy Act. It holds that where a Judge has *prima facie* evidence, he can order an inquisition. The matter is however, one which calls for the exercise of extreme caution. It is indubitable that an order directing an inquisition into a man's state of mind is a very serious thing and such

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1. (1892) I.L.R. 16 Bom. 676.
2. (1917) I.L.R. 42 Bom. 327.
3. A.I.R. 1944 Oudh 57.
4. (1919) I.L.R. 47 Cal. 67.
5. Order 36, r. 29 (6); Halsbury, Laws of England, 2nd edn., Vol. 31, p. 130; *see also* Practice Note in 1919 W.N. 262.

an order is intended by the statute to be a judicial determination carefully made upon adequate materials, *Saraj Basini Debi* v. *Mohendranath Bhaduri*[1]. For after all it is nothing less than a trial involving sometimes the history of a person's life back for many years, medical evidence and all sorts of family witnesses, *Mahomed Yakub* v. *Nazir Ahmed*[2]. It often happens that in such matters a person has to be protected from well-meaning and innocent people and from relations as well. As observed in *In re John MacLaughlin*[3], the interest of the person alleged to be of unsound mind ought to be zealously protected against any attempt of designing people, acting innocently but mistakenly, to place either his person or his property in restraint. Section 62 of the Indian Lunacy Act provides for an order directing an inquisition for ascertaining the state of mind of a person on an application made in that behalf. The Act is however silent as to what is to be done by the Court before passing the order, as to how the tribunal is to conduct the application. It is however ordinary commonsense that there should be some preliminary investigation to justify an order directing an inquisition. For, as observed by the Allahabad High Court, the matter is a painful one, specially in the case of people in comfortable circumstances who merely wish to lead a quiet life. It is but proper that they are not suddenly flung without sufficient reason into an elaborate inquisition, inasmuch as an inquiry of that sort when once started must be prosecuted to the bitter end and has all the attributes of an ordinary trial on an issue of fact, *Mahomed Yakub* v. *Nazir Ahmed*[2]. The necessity for a preliminary inquiry being admitted, the question arises in what way is it to be done. According to Rankin, C.J., the inquiry may be either with notice to the lunatic or without notice, *Saraj Basini Debi* v. *Mohendranath Bhaduri*[1]. In *Mahomed Yakub's case*[2] it is pointed out that it is impossible to lay down any hard and fast rule but that in the first place it is essential that the person moving for the issue of an inquisition order should support the application by affidavit or by tendering himself for examination to the Judge on oath in support of the allegations in his application and that the application ought to be supported by some medical evidence in the nature of a certificate from some doctor who had reasonable opportunity of seeing the condition of the alleged invalid. It was also pointed out that in many cases it would be very desirable that the Judge should seek some personal interview with the alleged insane person not with a view to forming a final opinion but to satisfy himself in an ordinary way, in which a layman can do, that there is a real ground for supposing that there is something abnormal in the mental condition of the person as would bring him within the Lunacy Act. What type of preliminary inquiry should be held has been considered by the Lahore High Court in *Mt. Teka Devi* v. *Gopal Das*[4] by Tek Chand, J. The learned Judge observed: "In assuming jurisdiction under the Lunacy Act, the Court must first of all keep in view the distinction between mere weakness of intellect and lunacy as understood in the Act . . . . It is . . . the duty of the Court before proceeding further, to determine judicially whether the person alleged to be incapable of managing himself or his affairs is a lunatic in this sense. . . It must be remembered that this finding has got very far-reaching consequences and must be given after very great care and deliberation. . . The Court cannot and ought not to deal lightheartedly with this important question, and it should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the person concerned have declared that he is a lunatic. . . . A Court cannot assume on the mere averment in the petition and the admission in the reply of the opposite party that a person is a lunatic. It ought to form its own independent judgment on the point. After examining the parties it may reject the petition *in limine* if it thinks that no *prima facie* case for enquiry is disclosed . . . Or, it may after examining the pleadings of the parties and as a result of its own personal interview with the alleged lunatic come to the conclusion that there are grounds for supposing that his mental condition is such as to bring him within the Lunacy Act. In that case it must order inquisition

1. (1927) I.L.R. 54 Cal. 836.
2. (1920) I.L.R. 42 All. 504.
3. (1905) A.C. 343.
4. A.I.R. 1930 Lah. 289.

and proceed in the manner prescribed". In *In re E. S.*[1] it was considered by James, L.J., that where on receipt of a petition for an inquiry of the state of mind of a person, a medical visitor was asked to report on the matter and the report was one indicating a case for inquiry but ultimately the jury found that the person was not insane, it was a case which justified to some extent an inquiry and investigation. That there should be a preliminary inquiry is clear. What the Judge should satisfy himself about is that it is not a case of mere weakness of intellect. The inquiry should be on the basis of affidavits or by an examination of the applicant on oath. The Judge may also have an interview with the lunatic. Medical testimony may be useful. Averments of relatives may not be accepted without independent corroboration. If there is *prima facie* evidence of lunacy within the meaning of that term as defined in the Act an order directing an inquisition would be justified. In the decision under review, these principles were accepted. It was also pointed out that where there was *prima facie* evidence, there was nothing wrong in the judge after so satisfying himself, ordering the lunatic to be produced before the Court even though there may not have been a distinctive preliminary proceeding.

APPANNA *v.* APPALARAJU, (1949) 2 M.L.J. 296.

This case decides that where a jewel was taken from a goldsmith by way of sample for approval with a view to place an order for a similar jewel and was subsequently retained as security for a debt alleged to be due from the goldsmith, the person so retaining would be guilty of an offence under section 406 of the Penal Code. Section 160 of the Contract Act declares the duty of a bailee to return the article bailed to the bailor on accomplishment of the purpose for which the bailment was made. Section 161 defines the responsibility that attaches to the bailee who fails to return. In *Reemah Ezekiel* v. *Province of Bengal*[2], a company had deposited with the Excise authorities a Government Promissory note as cover for a private bonded warehouse, to secure the liability which would arise from time to time to pay duty in respect of dutiable liquors imported by it and the authorities had accepted the deposit. On the expiry of the period of the license the security was not returned on the ground that a third party had an interest in the note. It was held that this was improper, that the Government of Bengal had become bailees of the note within the meaning of section 148 of the Contract Act and that the Government were under a duty to return it without demand as soon as the time for which it had been bailed or the purpose for which it had been bailed was accomplished. There was no suggestion that in the circumstances there could be anything more than civil liability. In *In re Adinarayana Iyer*[3], the complainant had left a wooden box on the pial of the accused promising to remove it later on. When subsequently he came to take it away, the accused would not allow him to do so, till he paid what he owed. The facts showed neither entrustment nor any disposal or application of the property. That in the absence of these ingredients there is no offence was pointed out by Subrahmanya Aiyar J. The learned Judge observed: "There is no evidence in regard to the alleged trust with reference to the box in respect of which the offence of criminal breach of trust has been brought, nor is there any evidence whatsoever to show any disposal or application of the property such as is required in a case of criminal breach of trust. The refusal of the accused to allow the removal of the box from his house unless the debt claimed by him to be due was paid, obviously does not amount to a criminal offence. The case under notice has regarded the retention in the former case as analogous to a lodging-house keeper's lien over the luggage of customers and lodgers. In England, an inn-keeper has a lien on goods brought into the inn by a guest. That is because he is bound by law to accept them[4]. It is doubtful how far this doctrine of English common law will be applicable in India. Even so, there was no question in that

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1. (1876) 4 Ch. D. 301.
2. I.L.R. (1939) 2 Cal. 52.
3. (1907) 17 M.L.J. 413.
4. Pollock and Mulla, Indian Contract Act, 7th edn., p. 510 f.n. (y).

case of the house-owner being under a duty to look after and be responsible for the trunk left. Nor was there any dishonest disposal. *In Rex* v. *Krishnan*[1], the law on this subject was expounded by Pandrang Row, J., as follows : "Suppose one of you gives your servant a certain sum of money telling him at the same time 'go and pay this to the shop-keeper so and so'. Here there is entrustment of money by the master to the servant with a direction that he should deal with the money in a particular manner, that is to say, to pay it to the particular shop-keeper. If he does not do so, but pockets the money himself then there is clear violation of the terms of the contract, which may be either express or implied, which he had entered into at the time of taking charge of the money in regard to the discharge of the trust reposed in him. In other words, the money is entrusted to him for the particular purpose of paying it to a particular person in which case if that has not been done and if the money is utilised by the servant for his own use, then you can say he has acted in violation of the contract express or implied, entered into regarding the way in which the trust is to be discharged". The learned Judge added: "Mere retention of money entrusted to a person without any misappropriation, even though he was directed by the person to pay it to so and so or to deal with the money in a particular way is not a criminal breach of trust; unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust; and even if there is such user there must be a dishonest intention. In the case of mere retention it is impossible to say it is dishonest. Apart from that, there must be some definite act to show misappropriation. Putting the money into one's own account in the bank may be misappropriation or may not be misappropriation. If it is drawn upon for his own purposes it is misappropriation. . . . . If a man is proved to have had a reasonable claim against another for more than the sum of money belonging to the other in his hands, his retention of it and even his user of it for his own purposes, I would say, in law would not amount to criminal breach of trust because the intention could not have been dishonest, that is to say, to cause wrongful loss or wrongful gain". These observations show that before a criminal breach of trust could be made out there must be established an entrustment, an actual user in violation of law or contract, and a dishonest intention on the part of the accused. It is also indicated that if there was a reasonable claim of the accused as against the complainant, then even a user of the money for his own purposes would not amount to a criminal breach of trust. To state that the ruling in *Rex* v. *Krishnan*[1] clearly says that wherever a thing is utilised for a purpose not intended against an express agreement or an implied understanding there will be an offence under section 406 is to miss the significance of the later observations cited *supra*. In the instant case there was no finding of any dishonest intention on the part of the accused. He claimed to retain the property by virtue of an alleged legal right. The question is whether there should not be some finding of dishonest intention about such retention.

DAKSHAYANI *v.* BRAHMAYYA (1949) 2 M.L.J. 303.

An observation of great importance made in this case is that it is a salutary practice for a Judge sitting in the Guardians and Wards side to examine all minors and interrogate them before directing their return or being handed over to any custody, even that of the legal guardian. Section 24 of the Guardians and Wards Act defines the duties of a guardian of the person of a minor. They include custody of the ward, his support, health, education etc. And section 25 provides that if the ward leaves or is removed from the custody of a guardian of his person, the Court may pass an order for the return of the ward to the custody of such guardian if it is of opinion that it would be for the welfare of the ward to do so. It falls to be noted that it is for the Court to satisfy itself whether the welfare of the minor requires such a restoration to the custody of the guardian. What precisely this direction implies is forcefully expressed in *Shushila Ganju* v. *Kunwar Krishna*[2]. There it was

1. A.I.R. 1940 Mad. 329.
2. A.I.R. 1948 Oudh 266.

observed : "In an application under section 25 of Act VIII of 1980 the sole criterion is the minor's welfare. It is only if the Court is of opinion that 'it will be for the welfare of the ward to return to the custody of his guardian' that it can pass an order for such return. *The rights of the guardian should not weigh at all* though, since in all legal systems rules relating to guardianship are framed with a view to protect the interests of the minors, it may be presumed that, if the law gives the guardianship to a particular person it is in the interests of the minors that that person should have custody of his person". (*Italics ours*). This would show that in an application under section 25, the welfare of the minor is alone the relevant criterion, that the rights of the guardian as such are immaterial but that where a person stands designated as guardian in law a presunption will attach that to be with him would be for the benefit of the minor. The presumption in this view is necessarily rebuttable. In *Muthuswami Chettiar* v. *Chinna Muthuswami*[1], it was pointed out that each case must depend upon its own circumstances, and however paramount the right of a father may be, that right is liable to be defeated where it is shown that it is better in the interests of the minor and for its welfare that it should remain where it is. In *Ponniah Asari* v. *Suppiah Asari*[2] it was stated : "That the father is the natural guardian of his children during their minority and has *prima facie* a paramount right to their custody cannot be disputed, and, if he is not unfit and there are no other circumstances in the case, he must be given the custody of his minor child or children. But there is one very important matter also which has to be considered and that is the welfare of the minor". That the burden lies on those seeking to prevent restoration of the ward to the custody of his guardian to show that the interest of the ward demands that the latter should be kept with somebody else, is fully recognised in *Atchayya* v. *Kosaraju Narahari*[3]. In that case it was stated : "It follows that when the guardian of the person of a ward applies for the custody of the ward he is only asking the Court to help him to discharge the duty cast on him by law with reference to his ward and it is for those who oppose such an application to make out that the welfare of the ward will be better served by its being kept out of the custody of its guardian and retained in the custody of the person against whom the application is made." It is one thing to say that the interests of the minor should be the sole consideration in directing a restoration of custody ; but it will be a different thing to claim that the ascertainment of such interest in every case should involve ascertainment of the wishes of the minor. That where the minors are old enough to exercise discretion the Court will take note of any wishes expressed by them, inasmuch as it would be a cruel disappointment to them to be cut off from any associations created or expectations raised during their stay away from their guardian is made clear in *Mrs. Besant* v. *G. C. Narayaniah*[4]. But even there it is not suggested that it would be a good practice for the Court in every case on the Guardians and Wards side to find out the wishes of the minor. Where the application for custody is by a husband in respect of his wife certain special considerations arising under the personal law of the parties might cut across. A Hindu husband becomes entitled to the custody of his wife from the moment of his marriage except that by custom or agreement the wife can stay with her parents till puberty, *Arumugha* v. *Viraraghava*[5], *Bai Ugri* v. *Purushottam*[6]. The texts of Hindu law relating to conjugal cohabitation and placing her under the control of her husband are not merely moral precepts but rules of law, *Mushi Buzloor* v. *Shumsoonissa Begum*[7]. It is true that where the wife is qualified by age to perform her conjugal duties the normal remedy of the husband is to sue for restitution of conjugal rights, *Surjyamoni* v. *Kali Kanta*[8]. But an application under section 25 of the Guardians and Wards Act will not be incompetent and in *Mt. Shyokumari* v. *Mathura Ram*[9], it has been held that he can so apply. If control was sought through a restitution suit, unless there is some justifying circumstance,

1. A.I.R. 1935 Mad. 195.
2. A.I.R. 1935 Mad. 363.
3. A.I.R. 1929 Mad. 83.
4. (1914) L.R. 41 I.A. 314 : I.L.R. 38 Mad. 807 (P.C.).
5. (1901) I.L.R. 24 Mad. 255.
6. (1893) I.L.R. 17 Bom. 400.
7. (1867) 11 Moo. I.A. 551 (P.C.).
8. (1891) I.L.R. 28 Cal. 37.
9. A.I.R. 1936 All. 267.

the wife will not be permitted to remain apart from the husband : Because such control is sought through an application under section 25 the wishes of the minor wife or her being a minor will not carry any greater weight, *Surjyamoni* v. *Kalikanta*[1], *Dadaji* v. *Rukmabai*[2], *Purshotamdas* v. *Bai Mani*[3]. It may also make some difference that the question is not one of appointment of a guardian for the minor but one likely to withhold from the husband a right which arises on marriage, namely, the right to the conjugal society of the wife. In view of this distinction it would seem that an application by a husband under section 25 for the custody of his wife may stand on a different footing from an application by a parent or any other person for the custody of a ward and secondly though the Court is to regard the welfare of the minor as the paramount consideration, where the ward is however his wife her obligations under the personal law will have to be considered alongside of it. The statement extracted at the commencement of the note presumably is not intended to mark a departure from the accepted principles but is meant only to emphasise that the welfare of the ward should alone be the relevant factor to be considered in an application under section 25 and that to ascertain the true interest of the minor an examination of the minor would be the proper way of doing it.

END OF (1950) 2 M.L.J.

1. (1891) I.L.R. 28 Cal. 37.
2. (1886) I.L.R. 10 Bom. 301.
3. (1896) I.L.R. 21 Bom. 610.